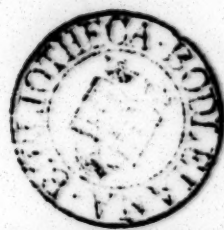


REMARKABLE  
DECISIONS

OF THE  
COURT OF SESSION,



From 1716 to 1728.

*H. Home and Kames*

THE SECOND EDITION.

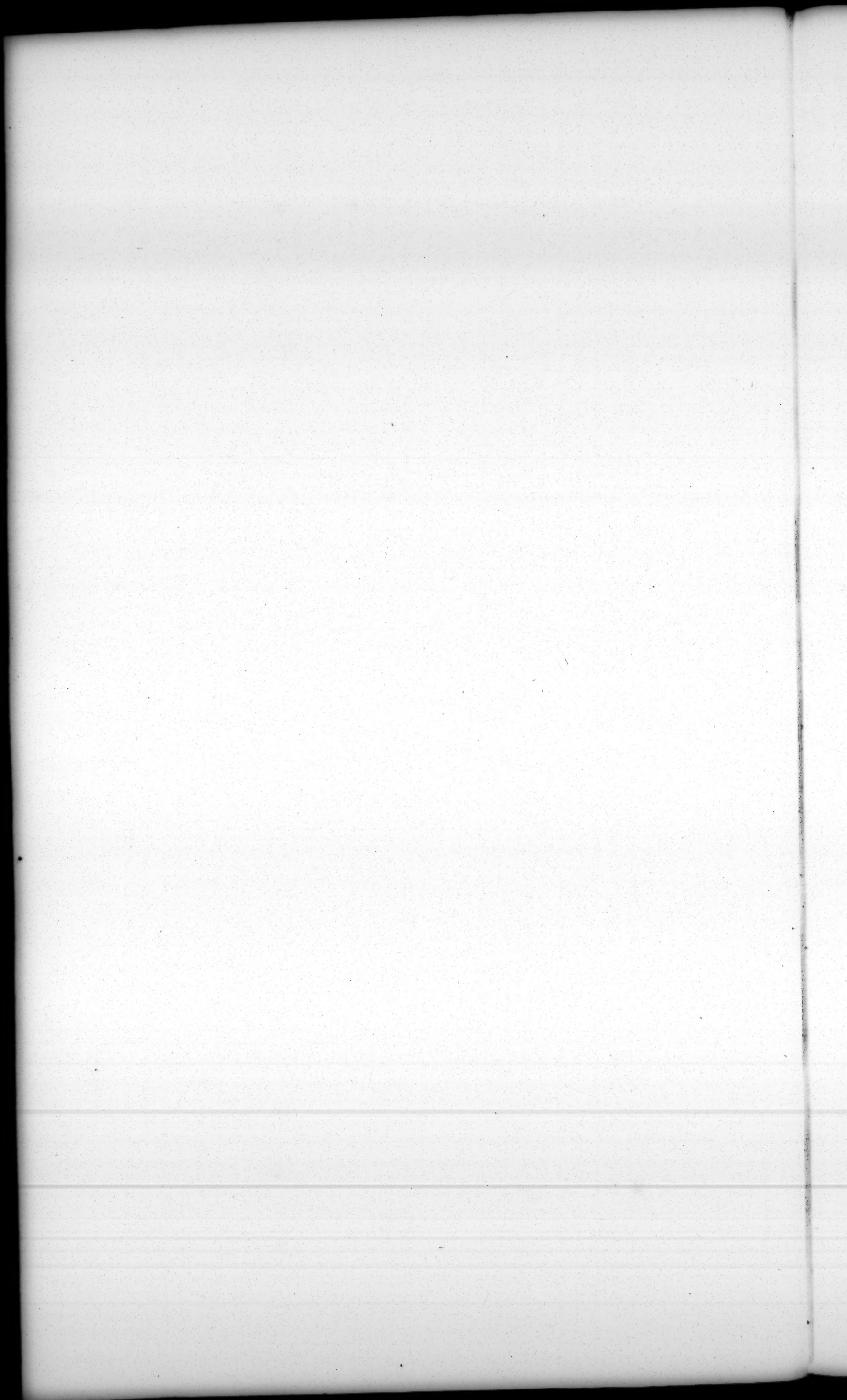
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T O T H E  
R E A D E R.

**T**HIS Collection was at first undertaken, with a view to be engrossed in a new projected edition of the Viscount of STAIR's Institutions: But the work turning bulky, it was thought more convenient to publish it separately; referring to it from the Institutions, as to other printed collections. The reader will not be disappointed, when he finds not here a complete journal of the Court of Session; that work is intrusted to a collector for the Faculty of Advocates: And this Collection being made up with a particular view, no decision is taken notice of, but wherein some new point is established; or which in some other shape, may contribute, to make the intended Edition of the Institutions more complete.

GRATITUDE obliges me, to acknowledge the assistance I had from a certain Great Man in this undertaking. When I mention the PRESIDENT of the SESSION to be the Man, and that he has found leisure to look into the work, the world will not be surpris'd, when they reflect upon that benevolence of temper, and affability, that fondness to protect and encourage, whatever has the shew of rising merit; virtues woven into his nature, and exerting themselves in all his actions. His more exalted talents may well spread his fame to other regions, but *these* have established him in the hearts of his countrymen; and while he is enjoying the reward of *the good and faithful servant*, will preserve a dear remembrance of him through many generations. This goodness I have felt; My LORD will pardon me when I speak warmly of it: To it is owing, if there is any service done, in preserving from oblivion some memorable decisions of a Court, in which of a long time he has made so distinguished a figure: It was his Lordship first gave me to think, I might be useful in this way: It was his countenance encouraged me to prosecute the work; and it is in consequence of his directions, if it has attained to any degree of perfection.

I CANNOT resist this opportunity, perhaps the only public one I shall ever have, to utter some of that esteem and veneration  
my



my heart is full of, for so valuable a countryman; and to congratulate him on these delightful reflections, that must continually arise in his mind, on the review of a long and well ordered life, led by the principles of wisdom, piety and honour. These are the enjoyments of a wise and good man! These diffuse a calmness and serenity, even over the gloomy appearances of life! But must afford an entire satisfaction, when accompanied with the affluences of fortune, the prosperity of friends, and the applauses of mankind. That his Lordship may still enjoy the same good fortune, and be long preserved for a blessing and ornament to his country, is the sincere wish of every good man.

H. HOME.

DECI-



R E M A R K A B L E  
D E C I S I O N S  
O F T H E  
C O U R T O F S E S S I O N,

From 1716 to 1728.

N<sup>o</sup> I.

22d November 1716.

The Viscount of ARBUTHNOT *contra* MORISON of Prestongrange.

An Obligement *contra fidem tabularum nuptialium*.

**B**Y contract of marriage betwixt the Viscount of Arbuthnot and Prestongrange's daughter, Prestongrange is bound to pay a portion of 50,000 merks: But there being a declaration and obligation granted by the Viscount of Arbuthnot, the day immediately before the contract of marriage, narrating, " That he was resolved to marry the young Lady, and to enter into  
" a contract, in which there was to be a portion of 50,000 merks pro-  
" vided to him; and that he was to give a jointure suitable to his cir-  
" cumstances, and the marriage-portion: But that he was sensible that  
" Prestongrange would be at great charge by the marriage; and that  
" seeing his friends would have 50,000 merks to be insert in the con-  
" tract, (albeit Prestongrange had refused to give more than 40,000  
" merks) it was his earnest desire to Prestongrange, that 50,000 merks  
" should be insert in the contract; but that he obliged himself, upon  
" his honour, to discharge 10,000 merks thereof, &c."

The Viscount designing to claim the full 50,000 merks, pursues a reduction of the declaration and obligation, as being elicited from him in his minority, without the consent or knowledge of his honourable friends, who were treating for him; and to his lesion, in as far as he gave provisions suitable to the portion; fifty chalders of victual to the Lady in life; and if there were but one daughter of the marriage, the Lady's portion of 50,000 merks to that daughter; and proportionally more, if two or more daughters: And the portion of the one daughter is expressed in the contract thus, " To her the mother's por-  
" tion underwritten:" Which was a manifest lesion, reflection and affront upon the Viscount's friends, who were drawn in to be witnesses to a contract in the lowest terms to which they would acquiesce, and yet

A

that



that contract to be made ineffectual by private influence upon a minor. 2do, The said obligation was *contra pacta dotalia*, which is reprobate by the law of this and most nations; as is observed by Voet in his Commentary upon the title, *De pactis dotalibus*, and Gronvegan *ad l. 4. C. De dotis promissione*, and Perezius on the title, *De pactis conventis tam super dote, &c.* And thus it was decided in the Parliament of Paris, as is observed by *Annaeus Robertus, Rerum judicatarum, l. 1. cap. 2.* where he has the pleading at length, agreeing almost *in terminis* with the present case, being a discharge elicited from the bridegroom of a part that was stipulated *nomine dotis*; and the like also found with us, 1st December 1705, Grieve *contra* Thomson.

It was answered for Prestongrange, The reasons of reduction are not relevant. It is true, the pursuer was minor; but he had no curators, and was *majorennitati proximus*, and was not lesed; because the portion was competent, and it was in his own power to accept the sum offered, in which he needed not the consent of his friends: For it was but a point of respect to them, that he chused rather to deal with Prestongrange privately, than to make any public struggle. 2do, Whatever might be said, if Prestongrange had elicited a bond, declaration or obligation from the Viscount, by proposing the expedient to him; yet the paper bears, and is matter of fact, "That Prestongrange was prevailed with, at the Viscount's desire, to satisfy the friends in the public contract:" And if he were overtaken, he would be the person ensnared, and not the Viscount; *Et minoribus deceptis non decipientibus jura subveniunt*: And if need be, what is affirmed in the Viscount's declaration is offered to be proven, *viz.* "That the defender refused a greater portion than 40,000 merks, and that he agreed to insert 50,000 merks in the contract, and accepted of the Viscount's obligation at his own desire."

And as to the lesion, by giving greater provision to the Lady and daughters; these are but casual and accidental lesions, which may or may not happen; and restitutions *in integrum* go not beyond the lesion: So that at worst the 10,000 merks could only be subjected to make up that liferent, in the event that the Lady should survive, or that there were only daughters of the marriage.

And as to the other reason of reduction, That the declaration was *contra pacta dotalia*, and the several decisions and citations on that subject; it is answered, None of these will quadrate to this particular case: For here there is no body concerned in the present question, but the pursuer and defender, who came to an agreement in the terms of the pursuer's declaration and obligation at the time of the treaty; and that paper is a part of the bargain, and qualifies the contract *ab initio*: But where contracts are completed, or minutes of contract, and afterwards altered, either before the public contract, in the case of minutes, or after, and before marriage; such deeds are justly reducible, as *contra pacta dotalia*: But where the deed is before the contract expressing the terms on which the contract is extended, and what is truly communed and designed; it qualifies the contract, as a backbond doth a bond. And the applying of that rule, will answer any practice that can be founded upon in our law. And as to the foreign authors, what they say has a special relation to their municipal customs: Neither doth our law quadrate with the civil law, in



in what relateth to portions whereof the property remains with the wife.

It was replied, That contracts of marriage are the most solemn contracts, in which the greatest sincerity and integrity is required, and the least enormity is by consequence redressed without mitigation. It was indeed in the Viscount's power to marry without his friends, and without a portion too, if he would; but then the marriage ought to have been publicly in that method, as by himself, they not concurring: But seeing the pursuer had that respect for his friends, that he would not disoblige, or deal without them, and that they would not comply and concur in other terms than these of the contract; fair dealing would have required, that the defender should have complied with the friends, or openly refused; and then the Viscount was to hear their advice, and either to reject them, and marry without their concurrence; or comply with them, and break the marriage: But to deal privily without their advice, was unfair; and yet more so, in as far as the highest conditions for the Lady and daughters of the marriage, were obtained suitable to the portion of the contract, as the Viscount's declaration expressly bears, and whereby there was a manifest lesion to the minor. And though, in some cases, reductions upon lesion are restricted to the true damage; yet in others, not; and the just punishment of clandestine dealing in a treaty of marriage, to the minor's lesion, ought to annul the deed *in totum*, upon both the reasons of reduction.

"The Lords repelled the defence, and reduced."

N<sup>o</sup> II.

3d January 1717.

ANNA MONTEITH, *contra* her nearest of KIN and CREDITORS.

*A Husband possessing by the Right of Courtesy, is liable for the Annualrents of the personal, as well as real Debts.*

**A**NNA MONTEITH being heiress of certain lands which descended to her by her mother, and there being several personal debts to which she would be liable as heir; she, and her father as tutor and administrator, pursue a declarator, "That it is necessary to sell the said inheritances, or a part thereof, for discharging the debts."

It was alleged for the pursuer's friends on the mother's side, That there was no necessity of a sale, because by a scheme of the debts and inheritance, it appears that there was a sufficient fund for payment of the yearly annualrents, and a valuable superplus.

It was answered, The pursuer's father had right to the inheritance by the courtesy of Scotland during his life, and was not in law obliged to pay either principal or annualrents of personal debts, whereby the inheritance would come to be affected with debts, and wholly exhausted, unless a part were sold; and the father, for the good of the pupil, was willing to concur in the sale, and lose the benefit of his courtesy of such lands as should be sold: Whereupon the question arose, "Whether a husband possessing by courtesy was obliged to pay the current annualrents of his wife's personal debts?" And the father



father did allege, That it was of his own good-will, for the advantage of his pupil, that he passes from his right to so much as shall be sold; but that a husband possessing by a courtesy, is only subject to real debts: In which Lord *Stair* expresses his opinion very plainly, and makes a parallel betwixt a courtesy and terce: And it is certain that a tercer is subject to no personal debts; and the right of courtesy is a full usufruct, which is subject to no personal burdens.

It was answered, The present question is not stated, nor did occur to Lord *Stair*, nor is there any decision upon record that can clear it; and therefore it must be determined according to the nature of the husband's right, and the analogy of law. And, *imo*, Although a terce and courtesy do in many things agree, yet not in the present question; for by our ancient law, the provision to wives was very much qualified and restricted. The husband could not anciently make a larger settlement upon the wife, than the *rationabilis tertia*, which was the liferent of the third part of the heritage he had at the time of his marriage; he might by paction give her less, as appears by the 16th chapter of the 2d book of the *Majesty*: And therefore it was very reasonable, that this *rationabilis tertia* should be free of all burdens which did not really affect the subject at the time. On the other hand, the courtesy of the husband was very ample by our ancient law, whereby the husband did not only enjoy the liferent of the wife's heritage, but did even enjoy the honour and dignity of the family, if any did belong to the wife, and had seat in Parliament, and all other privileges that would have belonged to her if she had been a male, both in her life and after her death: So that the husband, by the courtesy, represents the wife's family. From which it necessarily follows in reason and equity, that he should leave the family as he got it: And if it were not so, the family would be subject to diligences for personal debts, and sunk. And seeing the law or practice hath expressed nothing upon this subject, the decision falls to be made according to reason and equity. And the learned *Skeen*, in his notes upon the said 16th chapter of the 2d book of the *Majesty*, says, "That the courtesy is *forma cujusdam successionis*." It is not a proper succession, otherwise the husband would be liable to the principal sums, as well as the annualrents; therefore he calls it *forma cujusdam successionis*, a kind of succession which subjects him to the payment of all current yearly burdens, where there is not another subject or debtor, out of which or by whom the same may be paid.

"The Lords found, That the husband, in possession of the courtesy, was liable in the payment of the current annualrents of personal as well as real debts, to the value of the rents he enjoyed by the courtesy; reserving to him relief against executors, or other heirs or successors to any other part of the wife's estate, heritable or moveable, which he did not enjoy by virtue of the courtesy."



N<sup>o</sup> III.

5th February 1717.

WILLIAM CARSE *contra* Mr ROBERT RUSSEL.*Conquest divides amongst Females, as Heirs-portioners, as well as Heritage.*

**I**N the competition for the mails and duties of Wester Dikehead, William Carse craved to be preferred, because the lands were conquest by Tennant, who had two sisters, one elder, and one younger; and the lands being conquest, did ascend to the eldest sister, and to William Carse as descended of her.

Mr Robert Russel, descended of the youngest sister, claimed an equal share, as heir-portioner, and alleged that there was neither the opinion of lawyers, nor any precedent of conquests ascending to an elder sister. It was long doubtful amongst the ancient lawyers, in what manner conquest was transmitted: And that matter was determined by the 88th and 97th chapters *Quoniam Attatchiamenta*, by which it is provided, "That if there be three brethren, and the middle brother deceasing without heirs of his body, the eldest and first begotten shall succeed to the land and tenement, and not the after born or youngest brother," because lands conquest should ascend by degrees, and the heritage descend by degrees: And the 97th chapter is to the same effect. But there is no notice taken of elder or younger sisters; and the reason is, because the law of primogeniture carried the whole succession to the eldest son, or nearest heir-male, except in the case of conquest; but daughters or heirs-female succeeded equally *in capita*; therefore there was no occasion of a speciality in conquest in the succession of females: And lawyers who write upon the subject of conquest, do only state the case of a middle brother-german deceasing but not of females; yet *Craig, lib. 2. Dieg. 15. in fine*, has these words, "Si plures sint sorores, & una vel feudum vel annuum redditum acquisiverit, & sine liberis mortua fuerit, omnes sorores ad ejus successionem per capita admittentur."

"The Lords found the succession did descend upon the heirs of both sisters as heirs-portioners."

N<sup>o</sup> IV.

22d February 1717.

Sir JOHN HOUSTON *contra* CORBET of Hardgray.

*In Evictions of whatever Subjects, Rights in Security, Lands, &c. the Recourse upon the Warrantice is not restricted to the Price paid for the Conveyance, but reaches to the real Worth of the Subject evicted.*

**W**ILLIAM ANDERSON, late provost of Glasgow, being creditor to Maxwel of New-wark, his son Captain William Anderson was confirmed executor to him; who having obtained decret *passivè* against New-wark's son, an adjudication was led thereon in the year 1686: This adjudication was transmitted by assignation to Corbet of Hardgray, and by him disposed to Sir John Houston, with this clause

B

of



of warrandice, " Which disposition and assignation above written, I  
 " bind and oblige me, my heirs and successors, to be good and valid, to  
 " the said Sir John Houston and his forefairs, frae all perils, dangers,  
 " and inconveniencies whatsoever, any ways proceeding from my own  
 " proper fact and deed, or frae the proper fact and deed of the said um-  
 " quhile William Anderson late provost of Glasgow, or frae the said  
 " deceast William Anderson his son my cedent allenarly." There-  
 after, New-wark's heir having insisted in a reduction of Sir John  
 Houston's rights upon the estate of New-wark, particularly of the a-  
 bove adjudication disposed to him by Corbet of Hardgray; in that  
 process it was instructed, by a discharge under the said William An-  
 derson younger his hand, that 1360 merks of the sums for which  
 the foresaid adjudication was led, was paid to the said William as ex-  
 ecutor confirmed to his father: Whereupon the Lords cut off the pe-  
 nalty and whole accumulations in the adjudication, and restricted it  
 to a security for the principal sum and annualrents remaining, after  
 deduction of the sums contained in the discharge. Thereupon Sir  
 John Houston, in a process against Corbet of Hardgray, insisted upon  
 the clause of warrandice above narrated, for making good his damage  
 and interest sustained by him, in consequence of the above deed of  
 contravention of the warrandice; declaring, though he is well found-  
 ed to insist for the whole damage sustained by opening the adjudica-  
 tion, which otherwise would had the benefit of an expired legal, and  
 at least would have procured him payment of the whole accumula-  
 tions, with the interest thereof; yet he insists only for the sum and  
 annualrents thereof discharged by Anderson. On the other hand, it  
 was contended for Hardgray, That the action of warrandice could go  
 no further, than for repetition of the sums paid by Sir John to Hard-  
 gray for the disposition of the adjudication, deducing therefrom what-  
 ever Sir John Houston had by virtue of that adjudication recovered  
 out of the estate of New-wark: That this being an action of warran-  
 dice against an assignee, where the warrandice was incurred by no  
 fraud or fault of his, but by a deed of his cedent, which he could not  
 know; and that the subject of the transaction being with respect to a  
 personal right, the warrandice could be extended no farther than to  
 make up to the purchaser *quod deest* of what he paid for the purchase,  
 and to free him from any loss: Which is distinctly held forth by Lord  
*Stair, lib. 2. tit. 3. § 46. par. 4.* where, speaking of the eviction of  
 lands, he says, " The whole worth of what is evicted, as it is the  
 " time of the eviction, is inferred, because the buyer had the lands  
 " with the hazard of becoming better or worse, or the rising or fall-  
 " ing of rates; and therefore is not obliged to take the price he  
 " gave:" And then he adds, " But in warrandice of personal or re-  
 " deemable rights, the matter is ordinarily liquid; and there is no  
 " design of hazard, but an absolute relief." The plain sense of which  
 words is, That however warrandice be expressed in personal rights, the  
 intention of parties is, that the warrantor shall be no further liable,  
 than what he really gets for the transmission; though indeed in the  
 sale of lands, the warrandice is more strictly interpreted according to  
 the words, because of the subsequent uncertainty of the subject of the  
 sale: For lands may turn better, or worse; the rents may rise, or fall;  
 which are all upon the purchaser's hazard: But in acquisition of debts,  
 and



and personal rights, there are no such uncertainties; they still remain in the state they were given, unless the assignee's negligence intervene; which is not chargeable upon the warrantor. And thus also it was determined, 28th February 1672, Earl of Argyle *contra* Aiton.

In answer to this, it was pled, That here the action is not only upon account of a damage sustained by Houston, which is the common case of evictions, but of a *lucrum* had by the cedent; a sum uplifted and intromitted with by him, to which Sir John Houston has right; or, which is the same thing, by William Anderson, in whose place the cedent has stated himself by the tenor of his obligation. This in reality is not so much an action to free Sir John from a distress, as the claiming a sum lying in Anderson's hands, which belongs to Sir John Houston, and which Hardgray is liable for, as he who by an express obligation has taken burden upon him for Anderson: So that in any proper view of the matter, the dispute comes to be no other than this, If one *prudens et sciens* is bound to perform his rational contracts? The bargain was made betwixt Sir John and Hardgray, upon this express view and supposition pactiōned and agreed upon. That at least the whole sums were resting: As to the sufficiency of the debtor, and preference of the diligence, that indeed Houston took his hazard of; but that the debt was truly due, and no part thereof paid, was undertaken, and reasonably undertaken by Hardgray. The decision mentioned, is not the same with this; Aiton had indeed given warrantice to the Earl of Argyle, that the sums were owing not paid; and so they were truly, though his right was excluded by a preferable right, *viz.* that of the treasurer-depute: But here the ground of eviction is not, that Sir John's right is excluded by any preferable; but that the warrantor, or his author, has actually intromitted with, and discharged so much of the sums assigned.

Replied for the defender, There is no difference betwixt the cases, that can have any influence: In both, the warrantors were directly bound, that the debts should be good debts to the assignees; in neither case was the warrantice incurred by any fault of the warrantor: And it certainly has no effect upon the action of warrantice, whether it happen to be incurred in respect the warrantor never had a right, being excluded by nullities, or the preferable right of another, which was Aiton's case; or if there was once a subsistent debt, but discharged, which is the present case. The Lords found expressly the meaning of Aiton's warrantice to be, that the claim should be a valid claim to the Earl of Argyle; the claim was not found to be valid to the Earl, the contravention was directly incurred; and yet they gave only recourse for the sums paid to Aiton: And there is no reason it should go farther here.

“ The Lords found, That Hardgray, by the clause of warrantice  
 “ in his disposition to Sir John Houston, is not only obliged to  
 “ make Sir John *indemnis* and skaithless, as to the sum he  
 “ paid for the said disposition; but also, that he is further  
 “ obliged to pay to Sir John, the sum of 1360 merks with annualrents, contained in the discharge and obligation granted by Captain William Anderson, the defender's author, to  
 “ New-wark.”



N<sup>o</sup> V.

28th June 1717.

NATHANIEL DUCK of Leaths, *contra* MAXWEL of Cuil.*Indefinite Payments applied to Sums not bearing Annualrent, rather than to Sums bearing Annualrent.*

**T**HOMAS MAXWEL of Cuil, having in the 1712 granted bond to Nathaniel Duck of Leaths and partners, for L. 147 Sterling, bearing, "For a parcel of black cattle bought from them, for furnishing the parks belonging to Sir George Maxwell of Orchardton;" after several payments, he charged for L. 63 Sterling, as the remainder of the bond: Cuil suspended, on pretence of payment; and at discussing, produced a receipt for L. 60 Sterling, bearing, "In part payment of cattle bought by Cuil for the use of Sir George Maxwell's parks;" alleging the receipt ought to be sustained as an extinction of the bond *pro tanto*. The charger replied, That prior to the date of the receipt, the said Cuil was his debtor for more than L. 60 Sterling for black cattle, furnished likewise for the use of Sir George Maxwell's parks; and condescended on parcels furnished both before and after the parcel for which the bond was granted. The debate upon this arising, Whether this indefinite receipt ought to be ascribed to the bond, or to the other parcels of cattle alleged likewise furnished?

It was contended for the suspender, 1<sup>mo</sup>, Allowing such cattle to have been furnished, the receipt notwithstanding must be applied to the bond as *durior fors*: Which is plain from l. 3. § 1. & *seq. solution*. where these rules are laid down, *Si à neutro dictum, in graviolem causam videri solutum, et potius quod cum pœna, quàm quod sine pœna debetur, aut in antiquius debitum*. All these rules concur in the suspender's favours: The sum in the bond was the *gravior causa*, as bearing annualrent, and having summar execution; it was due under a penalty, and by the charger's acknowledgment, also *antiquius debitum*, who pretends to apply this receipt mostly to goods said to be sold after the date of the bond. 2<sup>do</sup>, The suspender refuses the alleged furnishing; and it is not now competent to lead a proof *prout de jure*, being prescribed *quoad modum probandi* by the lapse of three years, which supercedes entirely the first point: And it appears to be a certain rule in our practice, That debts prescribed *quoad modum probandi de jure*, cannot be founded on, either by way of action or exception, unless offered to be proven resting owing by the debtor's oath. See 5th July 1681, Dickson *contra* Macaulay; 18th January 1712, Harris *contra* Maxwell of Orchardton.

Answered to the *first*, The rules anent applying indefinite payments *in duriolem sortem*, take only place where the circumstances of the debts are otherwise equal; but law allows not application to be made by either party to the manifest prejudice of the other: And for that reason it was, that the Lords would not allow an indefinite payment to be applied to a sum secured by caution, where the debtor was insolvent; whereby another sum for which there was no cautioner would have been lost, 13th February 1680, Macraish *contra* Campbell. And just so here, the suspender cannot now, after the other debts are prescribed,



prescribed, pretend to apply this receipt to the extinction of the bond, and then cut the charger off from his other debts, on pretence of prescription; but the charger having got payment indefinitely, and the bond still unretired and undischarged, he was *in optima fide* to rely thereon as a standing security, and could not with a good conscience have insisted for payment of the other cattle furnished, which were looked upon to be paid *pro tanto* by the receipt of that L. 60: But further, the law lays down very equitable grounds for supporting the charger's plea; for although it gives the debtor first, and then the creditor the application, in order after other, 'tis with this equitable caution, *dum in re agenda hoc fiat, ut vel creditori liberum sit non accipere, vel debitori non dare, si alio nomine exsolutum quis eorum velit*. And *dummodo sic constituemus, ut in re sua quis constitueret*; which plainly points, that in the application of the general rules of law, 'tis to be considered what was *actum et tractatum* at the time, "And what application is most equal for both parties." And here, all the circumstances concur in the charger's favours: For *1mo*, At the date of the receipt both debts were due, that which was constitute by the bond, and that which arose from furnishing of cattle without writ; and no prescription could then been obtruded against either: Now it is not supposable, that any prudent man would have received payment of a debt secured by writ, and allowed another equally onerous, but not secured by writ, to stand out without any security given therefor. *2do*, Equity infers the presumption, that indefinite payments are applied rather to sums not bearing interest: For since the common interest is determined by the law as a just equivalent for the use of money, 'tis manifestly unequal for a debtor to pay a sum bearing interest, while he retains in his hands another sum that bears none; whereby the creditor has neither the use of his money, nor an equivalent for it: So that in this question, *agitur de damno evitando* upon the creditor's part; whereas the debtor is *certans de lucro adquirendo*; which is manifestly unequal. To the *second*, answered, The prescription mentioned, bars the charger from making use of a proof by witnesses to establish his right against the suspender, so as to found a claim either by way of action or exception; for there indeed the act and the decisions would meet him: But seeing the whole import of the proof will be, to give evidence that there was once such a debt existing, in order that the receipt may be applied thereto, and not to another debt that is still standing out, there is nothing in the act or decisions to hinder a proof for that end.

"The Lords found it relevant, to apply the sum contained in the receipt, to the payment of black cattle bought by the suspender from the charger, for the use of Sir George Maxwell's parks, within the three years of the date of the receipt: And they found it relevant for the charger, to prove in the terms of his condescence *prout de jure*."

Actor Ro. Dundas.

Alter Ja. Boswell.



N<sup>o</sup> VI.

6th July 1717.

JANET ROSS *contra* BAIN of Tulloch.*Bond of Provision, by what Means it becomes a jus quæsitum to the Child.*

**S**IR DONALD BAIN of Tulloch disposed his lands to his eldest son John, with the burden of his debts and childrens provisions; and *de facto* took from him bonds of provision in name of his children. Janet Ross, grandchild by Elisabeth Bain, one of Sir Donald's daughters, pursued an action of exhibition of her mother's bond of provision, against Kenneth Bain, Sir Donald's second son and heir-male, containing a conclusion of payment, libelling, That the bond had been delivered to him by his father, for the said Elisabeth Bain's behoof; which was offered to be proven by his oath. Kenneth accordingly deponed, and the import of his oath was, "That his father delivered to the deponent the bond to keep for him; that after the bond had been in the deponent's custody some months, he delivered it back to his father; who, in the deponent's sight, did cancel and destroy the same, and that by reason the daughter's behaviour did not please him."

This oath coming to be advised, it was pled for the pursuer, Whatever power a father may have with respect to bonds of provision granted by himself, he has no power to revoke or cancel such bonds granted by third parties. The parent's power of revocation is founded in the general maxim of law, "That an undelivered deed may be recalled." And in reality, the parent as to that point has no further privilege than any other granter, except what arises from a presumption in law concerning the delivery of writs, *viz.* That deeds in favours of foreigners, found out of the granter's hands, are delivered for the behoof of the creditor, unless the contrary appear; whereas deeds done in favours of children, though found in a third party's hands, are presumed deposited upon the father's account, unless they are proven delivered for the behoof of the child. Thus then, however the presumptions concerning the delivery may vary, it is plain, that the delivery or not delivery, is what gives the parent the power of revoking or not revoking; which puts parents as to that particular, upon the same footing with others: Nor is there any foundation for what hath been held forth upon this subject, "That the faculty of revocation arises from the paternal power of providing children at the parent's pleasure, and of altering their settlements according as the childrens behaviour merits." It is true, before parents complete their deeds, which in some sort are donations, they have an unlimited power, as all other donors have, of forbearing to complete their intended gratuity; but when once deeds of parents are completed by delivery, they become valid and irrevocable, without respect to the paternal power; which is a demonstration, that the power of revoking does not depend upon any specialty of fatherly authority: Having premised this, it was observed, That deeds granted by a third party in favours of children, though of the parent's purchasing, are in a different case: For though such deeds,



deeds, while they remain with the granter undelivered, are revocable by him; when once completed by delivery, either to the child or his parent, the administrator, they become absolutely irrevocable, just as deeds done by the parents, and delivered actually to the children, do. For clearing this point, pursuant to the foregoing observation, one needs but consider, whether the putting a deed made by a third party, in favours of a child, in a father's hand, is in law an effectual delivery or not; for if it is, the deed must certainly become irrevocable: And that it is so, appears from this, That were the granter reducing or revoking the deed, the delivery to the father would in every respect be equal to the delivery to the child himself. And indeed, there is a great odds betwixt the parent's custody of a writ granted by himself to his child, and his custody of a writ granted by a third party: In retaining his own writ, he withholds the delivery, and preserves the power of revocation; whereas in receiving a writ from a third party, he acts as administrator for the child to whom it is granted: The writ is established by delivery; there is a *jus quæsitum* to the child; and the father's acting in name of the child, was never intended to give him any power in the bond, of revocation or otherwise; which now, after delivery, is not even competent to the granter. And it is not a specialty of any importance, that the third party granter of the deed in question was heir to the parent, since the transaction, in consequence of which the bond of provision was granted, was a fair contract entered into betwixt the father and the son *tanquam quilibet*, and must be determined by the same rules, as if a stranger had granted the bond. From what hath been said, it is plain, that bonds taken by parents in favours of their children, where they only have the custody as administrators, are not revocable at pleasure; and therefore, that in the present question, Sir Donald Bain of Tulloch, who had the keeping of the bond granted to his daughter Elisabeth by John Bain, could not warrantably destroy it, so as to discharge John of the debt, or save himself or his heirs from accounting for his illegal action. But, *2do*, There is a further circumstance in this case; and that is, That John Bain of Tulloch had an estate disposed to him, with the burden of this bond of provision amongst others: Now the moment John Bain was infest, this bond became a real burden, and Sir Donald could not alter or revoke a settlement, that was so far secured to the creditor, as to become a real security upon the estate.

In answer to the *first*, it was owned, That if this bond of provision had flown from a stranger, though put in the father's hands, he could only have the custody as administrator: But where the bond flows from the eldest son, the apparent heir, and who got right to the estate *præceptione*, for undertaking the father's debts and provisions; this, in the construction of law, is the same thing, as if the father had granted the bond of provision: And indeed there can no material disparity be put. It was not sure the intention of the father, to alter the circumstances betwixt him and his children, but to secure them against their elder brother, to whom he was conveying his estate: The form here is not so much to be considered, as the intention of parties; and seeing *hoc tantum agebatur* by the transaction, to make a conveyance to the eldest son, with burden of the debts; the  
younger



younger children ought to reap no more advantage by this, than if the father had reserved a power to burden the estate with their provisions, and had accordingly granted bonds, but without delivery. The presumption therefore is, when the father took the bonds of provision, keeping them to himself, or which is all one, putting them in the custody of one of his other sons, in family with him, "That he acted in that matter for his own behoof, that he might have it in his power, to bind his eldest son in provisions to his other children, or not, as he pleased, and not at all as administrator for them." Answered to the *second*, Suppose it had been made a real burden, that does not take it out of the father's power to discharge his son of the provision, more than if he had retained a faculty to burden, which he might have exercised, or not.

"The Lords found, That Sir Donald Bain having given the bond libelled upon, to his son Kenneth, and the father having called for the said bond; upon his getting up thereof from his son, did warrantably cancel the same."

*After Dun. Forbes.*

*Alter Sir Wal. Pringle.*

N<sup>o</sup> VII.

July, 1717.

WILLIAM WILSON, *contra* the CHILDREN and HEIRS of Alexander Short, Merchant in Stirling.

*Passive Titles, Gestio pro herede, and Præceptio hereditatis.*

JAMES SHORT made a disposition of his heritage, upon deathbed, to Mary Scot his mother, in prejudice of Alexander Short his eldest brother and heir; and the mother afterwards conveys her right in favours of her grandchildren the Lord Salin's daughters, under this condition, "That in case of heirs of her eldest son Alexander's own body, Salin's children should denude in their favours." In the mean time Lord Salin obtained bonds from the said Alexander, upon which he adjudged from him the heritage, as charged to enter heir to James his brother; but at the same time granted a backbond, wherein he obliged himself, so soon as he should attain possession, to dispoise the same in favours of Alexander Short in liferent, and to the heirs of his body in fee; which backbond was registered. Afterwards, it happened that Alexander Short had children of his own body, who in their minority intended action against Lord Salin's daughters, for denuding of the subjects disposed to them by Mary Scot, in terms of the above quality in the disposition: In which process, compearance was made for Lord Salin, who did allege, "That he had an interest to hinder his daughters to denude, because he, as creditor to Alexander Short, had adjudged from him, as charged to enter heir to James Short, the said James's rights, whereby he was entitled to reduce the disposition to Mary Scot, as done on deathbed, in prejudice of Alexander Short, James's apparent heir; and that therefore he would not suffer that right to be conveyed, but insisted to have it reduced, and declared null." It was answered for the pursuers, "That Lord Salin could not found



“ found upon his adjudication, or any debt in his person, to prejudice  
 “ Alexander Short’s children, because his rights were only in trust;  
 “ and that he was obliged by his backbond, to convey the subject in  
 “ dispute in favours of Alexander Short, in liferent, and his chil-  
 “ dren, in fee.” Upon which the Lord Salin’s daughters were de-  
 cerned to denude.

It was upon this answer made for Alexander Short’s children, that William Wilson, a creditor of Alexander Short, endeavoured, in a pursuit against these children, to fix them in a passive representation to their father: And he insisted, That they ought to be liable for their father’s debts, because they made use of a right not only belonging to their father, but to which they could not have right but as heirs to him; and that in this the passive title of behaviour was plainly founded, “ Using a right competent to the predecessor, and “ thereby *gerentes se pro hereditibus*.” For they must only be understood as substitute in the right, notwithstanding the bond is taken to the father in liferent, and the heirs to be procreate in fee, since at that time they were not in existence; for in all such cases, the fee has still been determined to belong to the father. *2dly*, That it had in it *præceptio hereditatis*, and must be understood as it had been a conveyance by the father to his children *post contractum debitum*: For the case is all one, as that in place of the father’s disposing to Lord Salin, and taking a backbond from him, to denude in favours of himself in liferent, and the heirs of his body in fee, he had directly made a disposition of these subjects to the heirs of his body; seeing what one does by a trustee, is understood as done by himself. It was owned, That the childrens declarator and possession did not proceed directly upon the backbond: But as to this it was observed, Though their declarator and possession was founded upon Mary Scot’s right, it was alone supported by Lord Salin’s backbond, without which their right was ineffectual in law; and therefore the legal effects ought not to be attributed to the defective right, but to that which gave it force: In all the above mentioned debate, it was never pled that Mary Scot’s right was good *per se*, it being without controversy liable to the objection of death-bed; but only that the objection was not good at Lord Salin’s instance, in regard of his backbond to their father. Now, if it was impossible to obtain this decret, or support Mary Scot’s right, but by the backbond, it must be held in the construction of law the same, as if the decret had been founded directly thereupon: For it is not only libelling and pursuing upon a predecessor’s right, that infers *behaviour*; but using or taking the benefit of it, by exception, reply, or any other way. In this argument, it was contended to be all one, whether the matter be taken in the view of *behaviour* or *præceptio*; for the case is applicable to both; it being not only *præceptio* where one possesses *titulo lucrativo post contractum debitum*, but also possessing by any other title, if he make use of the *titulus lucrativus*, to defend his possession, and exclude third parties.

It was answered for the defenders, *first*, As to the passive title of Behaviour; There is no ground in the reason of the law, or in practice, that the founding any allegiance in law upon a writ, supposing it really had been the defunct’s, should infer a Behaviour. This is



truly a penal passive title, introduced to deter apparent heirs from irregular intromission in prejudice of creditors, (see Lord *Stair*, and *Mackenzie*, upon this head:) Whence it follows, where there is no intromission, no disposal of any part of the defunct's estate, nor any deed whereby creditors can be prejudged; this passive title is not competent. And here the pursuer does not found upon any intromission had by the defenders: For they could not be said to have intromitted even with the paper they founded on, because it was a registered deed, and they made use of the extract. In this matter there is a great difference betwixt our law and that of the Romans: Among the Romans, they having no *Services*, as we have, and no other form of entry, except actual immixtion, or verbal claiming the heritage; so soon as an heir declared his mind to accept of the heritage, he became heir both *active* and *passive*: But with us no declaration, however express, will make an heir either *active* or *passive*. An heir, in our law, must actually enter by a service, or he must intromit: By the one, he becomes heir to all intents and purposes; by the other, for a punishment upon him, he is made liable to all the creditors, who have an interest that their debtor's goods be not abstracted. There is a remarkable decision to this purpose, as it is observed by *Dirleton*, 20th January 1675, *Carfrae contra Telfer*, where the Lords found, "That the proponing a defence of payment, or such like, was not such a deed as could infer the passive title of behaving, unless it were adminicled with intromission or otherwise." For the same reasons it has been found, that the taking out a brieve, did not infer a Behaviour, 28th June 1670, *Eleis contra Carse*: Where it was also found, that the apparent heir's signing a revocation of deeds done by his predecessor, while minor, did not infer Behaviour; though that was as express a declaration of the intention to be heir, as could be: But still there was no intromission, and therefore no Behaviour in the sense of our law. 2do, An apparent heir can never be liable in a Behaviour, where the thing intromitted with, or acclaimed, was not *in hereditate* of the defunct, and could not be carried by a service to him; and in this case it is obvious, that by Salin's backbond, Alexander Short was only liferenter, and the fee stood provided to the defenders themselves: So that their using that writ, or founding upon it, was not using a writ that belonged to the defunct, but a writ that belonged to themselves; and could never been carried by a service to him. It is true, the pursuer does pretend, That this writ being procured by Alexander Short the father, and his children being but *nascituri*, he must be understood fiar, and the children only substitutes, because a fee cannot be *in pendent*. But to this it is answered, That a fee cannot be *in pendent*, is a mere imagination in every case: But allowing the maxim, no argument can be drawn from it; for here the fee of the adjudication was not *in pendent*, but remained with Lord Salin, and he only obliged to denude in favours of Alexander Short's heirs, upon their existence. There is a great difference betwixt a disposition and infestment, which denudes the grantor, and an obligation to grant a disposition, which does not denude: In the case of an obligation, there is no pretence for applying this maxim, because the grantor is not denuded; the fee of the subject remaining with him, until the existence of the person who is entitled

to



to demand of him to denude of the fee. 3<sup>tio</sup>, Supposing Alexander Short fiar by the conception of the bond, the defenders founding thereupon in the manner they did, could infer no Behaviour: For they did not claim that backbond to belong to them, nor any benefit thereby, so as to desire Salin to denude of the subjects and diligences in their favours; but made use of it only as a mean of proof that these diligences were in Salin's person only in trust, and therefore *jus tertii* for him to quarrel their rights: They only proponed a negative exception, "That Salin could not make use of these rights," not because they were theirs, but because they were not Salin's. There is no manner of inconsistency, for the defenders to have said that these titles of Salin's were *in hereditate jacente* of their father; and therefore suppose they would not use them themselves, they would not suffer Salin to use them in their prejudice: Just as an apparent heir, in case another person really not heir should offer to serve to his predecessor, might compare and object against that service, and say, "That the purchaser of the brieves is not heir, but that he himself is nearest heir." This an apparent heir might do, without the least hazard of behaviour: It would still be entire for him to accept of the succession, or not, as he thought fit.

To the *second* allegiance, That the defenders are liable *praeceptione hereditatis*; it was answered, Since they did not claim the benefit of the back-bond, so as to make Salin denude in their favours, it can never be said, there was any right derived to them from their father, or that they possessed by virtue of a right from him: The back-bond, indeed, had that effect, that it debarred Salin from questioning Mary Scot's right, which is their title of possession; but it will never follow, because that back-bond was granted to their father, therefore they possess by a right from him. Let the case be stated in the worst view, That the defenders had got a discharge of the action of reduction *ex capite lecti* from their father, that might be pled sufficient to make their father *passive* liable as representing James Short, but could never make the defenders liable *passive* as representing their father; far less could the obtaining such a discharge from Salin an adjudger, make them liable: Which is yet clearer, if it be considered, that Alexander Short his not quarrelling this right of Mary Scot's, or even his taking Salin expressly bound not to quarrel it, suppose he had done so, is not like a positive ratification granted in the defenders favours: For it was still competent to this pursuer, or any other creditor of Alexander Short's, to have adjudged from him as charged to enter heir to James, and then to have reduced the defenders right; and if this was neglected, *sibi imputent*. This is plain, the defenders have no right from their father; only he omitted to quarrel their right, and at most took one creditor, Salin, bound by a deed not to quarrel it: But this was no restraint upon other creditors, and cannot by other creditors be said to be a deed whereby the defenders rights were strengthened or supported, since against them it had no effect.

It was urged, in the *next* place, for Wilson the pursuer, That in any view, the defenders must be found liable *in valorem*: For since they have got a benefit by a deed of their father's, equity dictates, that



that they ought to account to his onerous creditors for the value of that benefit.

The defenders acknowledged, That the Lords have sometimes found an apparent heir liable *in valorem*, where he neither had behaved, nor was liable *praeceptione*: As for instance, where the father had acquired lands in name of his son, or in a trustee's name for his son's behoof. But the reason was, not only because the son had got a benefit from a right purchased by the father, but because the creditors pursuers sustained a prejudice, by the father's applying so much of his means towards the purchasing that estate in the son's name, or for his behoof. And, *2do*, It is to be observed, wherever such a case happened, the creditor was entitled to reduce the apparent heir's right; and that being reduced, to affect the subject by a diligence: In which circumstances, to save the trouble and circuit of diligences, the Lords have frequently made the heir directly accountable *in valorem*. All which serves to prove, that the claim here is groundless: For, *1mo*, The defenders do refuse, that any subject that ever was purchased by their father's money, was, or is lodged in their person. It does not even appear, that the backbond was purchased by his means or money. *2do*, They do refuse, that any part of the subject of Wilson's payment, or which he can now affect by any form of diligence, is in their person. He had it, indeed, once in his power, by charging Alexander Short to enter heir, to state himself in his place by adjudication, and to insist against Mary Scot in a reduction *ex capite lecti*: This he has neglected, and now he has it not in his power; but his negligence must land upon himself, and the defenders must be affoizied, who possess no subject that the pursuer has any manner of claim to.

"The Lords affoizied the defenders."

Actor Sir Wal. Pringle.

Alter Ro. Dundas.

N<sup>o</sup> VIII.

July 1717.

WILLIAM RAE *contra* JANET WRIGHT.

*The Laws of the Place where the Obligations arise, and not of the Persons, obtain with respect to Quasi Contracts, as well as Contracts.*

**J**AMES RAE, a merchant traveller, having died in England, his brother Richard, without any warrant, did intromit with his effects: For the equal half of which intromission, his executrix, Janet Wright, being pursued by William Rae, a third brother, her defence was, "That the intromission having been in England, the action for restoring these effects or value, is prescribed by the running of six years, conform to the English statute of limitation, *cap. 16. Parl. 21. Jacob. I.*"

It was answered, That the statute has no place in this case; which must be judged by the Scots law, both parties having been Scotsmen, though sometimes they travelled into England: And *de facto*, before the lapse of six years after Richard's intromissions with what belonged



longed to his brother James, he returned to Dumfries with his effects, and there continued to his death; during which time, the English prescription could neither run in his favours, being out of the country, nor against his brother William, who could pursue no where else but in Scotland. Nor does this question fall to be decided by the English law, *ratione contractus*; for here was no written obligation, agreement or contract betwixt the parties: The ground of the present action, is a plain delict, an injurious and vitious intromission with a defunct's effects; and the case is the same, as if Richard had robbed his brother in France or Holland, and retired with the effects to Scotland, and thereupon pretended to defend himself by foreign laws: And crimes and delicts, and their consequences, are more *juris gentium*, than contracts or obligations, punishable wherever the offenders may be found, *ne maneat impunita*.

Replied, It is a rule, That the *locus contractus* is only to be considered, according to the laws of which, action upon the contract falls to be regulated; and there is the same reason this should hold in *facts* or *deeds*, by which obligations are inferred, in law called *quasi contractus*, seeing it is the place where the obligation arises, whatever way contracted, that regulates the matter: And therefore, there is no ground of disparity, though Richard afterwards came home and died in Scotland: The ground of the obligation arose in England; and the statute is not founded upon any personal consideration, has no relation to the *person*, but to the *place* alone, where the obligation arises, whether flowing from a *true* or *quasi* contract. It is of no moment, that Scotsmen may be pursued in Scotland, for delinquencies committed abroad, and that according to the Scots law. Denisons of a country, are still subjected to the criminal laws of their country, wherever they are; but in matter of civil obligations and contracts, nations have gone into this expediency, That the laws of the place where they arise, should regulate their form and matter: And here the action is plainly a civil action for restitution, without any adjected penalty.

“ The Lords found the English prescription took place.”

Actor Sir *Ja. Nasmyth*.

Alter Sir *Wal. Pringle*.

N<sup>o</sup> IX.

11th December 1717.

The EXECUTORS CREDITORS of Janet Meldrum, *contra* KATHARINE KINNIER.

*Alienations by Debtors not reducible upon the Act 1621, if the Debtor did not thereby become insolvent.*

JOHN CUNINGHAM of Enterkin, being debtor to Janet Meldrum in L. 1000 Scots, she, some time before her death, gave him up his bond; which was immediately renewed in name of her daughter Katharine Kinnier. Her creditors, after her death getting notice of this transaction, raised a reduction against the daughter, upon the act of Parliament 1621; with a conclusion of declarator, That the

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money



money was the mother's, and that she could not take the bond in her daughter's name, in defraud of the pursuers, her lawful creditors.

The daughter's defence was, That this transaction was forbid by no law, the mother being solvent at the time of granting the bond; and though *ex eventu* her debtors became insolvent, it is sufficient to exclude a reduction upon the act 1621, that the mother had sufficient effects to pay all her debt, over and above the money for which the bond was granted to her daughter.

Answered for the creditors, That however this defence might be pled against a prior gratuitous creditor, it were apparently unjust to sustain such deeds in prejudice of prior onerous debts: Onerous creditors ought not to be put to dispute what their debtor's condition was the time he made the alienation, it being sufficient for them to say in competition with posterior gratuitous creditors, That the debtor is insolvent; since upon the eventual bankruptcy of the debtor, the donatar ought rather to suffer, than the onerous creditor, according to the principle, *Potior debet esse conditio ejus qui certat de damno evitando, quàm ejus qui certat de lucro acquirendo*. And the reasoning is the stronger in this case, in which the creditors are more defrauded, than if the mother had only granted a bond of provision to her daughter; for at any rate they would have come in *pari passu* with such a bond: Whereas if the defender be assailed, they shall thereby be entirely cut out of the most valuable share of their debtor's means.

Replied for the defender Katharine Kinnier, She is much better founded in her present situation, than if she had only a bond of provision from her mother. When one accepts a personal bond, he agrees to trust his debtor, and to run the hazard of his insolvency: Personal creditors therefore are in this view all embarked as on one bottom; if their debtor's funds prove shortcoming, the loss falls upon them; first indeed upon the gratuitous creditors: For if there is not sufficient for all, it is but equitable that the onerous creditors draw first; according to the maxim, That in competitions, *Potior debet esse conditio ejus qui certat de damno evitando, quàm ejus qui certat de lucro acquirendo*; or, which comes to the same, *Nemo debet locupletari aliena jactura*. And in this case the maxim is directly applicable: For whatever is given to the gratuitous creditor, who is *certans de lucro acquirendo*, is virtually taken from the onerous creditor, who is *certans de damno evitando*. But where one entirely solvent, and thereby at an absolute liberty of alienation, gives away any of his effects, still leaving sufficient for all his creditors; if such an alienation, whether gratuitous or onerous, cannot be secured against posterior deeds of the alienator; it will follow, there is no such thing as an absolute power of disposal of any thing in the world. Here the maxim does in no shape apply; for the creditors suffer nothing by the alienation: If they continued to trust their debtor afterwards, *sibi imputent*; at the time of the alienation there was a sufficient fund for all; at that time they might have disengaged themselves from their debtor, by doing diligence for payment; and if they chose to give longer trust, the hazard of that ought not to lie upon a third party, who is not in a competition with them about their debtor's effects, and who is no way



way connected with them or the debtor, except that he now stands possessed of some effects which were legally given him by the debtor, while he had the absolute disposal thereof.

“ The Lords sustained the defence, That the mother had effects  
 “ either *in specie*, or obligations by responfal persons the time  
 “ of granting the bond, sufficient to satisfy the debts then resting.  
 “ ing.”

N<sup>o</sup> X.

February 1718.

ROBERT FISHER *contra* MARION PRINGLE.

*An heritable Bond, if it is moveable before the Term of Payment?*

**T**HE question occurred betwixt these parties, about an heritable bond, having a clause of infeftment, the debtor dying before the term of payment; whether it was heritable or moveable? And it was contended for Robert Fisher, who had paid the debt as heir of the defunct, It is a general rule, That all heritable sums are moveable before the term of payment; and therefore he ought to be relieved of this debt by Marion Pringle, who had intromitted with the defunct's moveables.

The defender noticed, That this assertion proceeds from a mistaken notion of law, as if all bonds indistinctly, whether moveable or heritable, were understood to be moveable before the term of payment: Whereas indeed that rule only holds as to moveable bonds, which before 1641 were heritable after the term of payment, as to executors; and to this hour exclude the relict and the fisk when that term is once past: But he believes it was never once doubted, that an heritable bond was by the *destination* a debt due by the heir, without regard to the term of payment, or any other consideration. And for clearing this point, it was noticed, That our lawyers, until their doubts were settled by acts of Parliament, did always reason from the intention or destination of the parties to infer a sum heritable or moveable, so as to befall the heir or executor, where they could not clear the point from the nature of the thing; and therefore, in determining the nature of sums secured by bonds bearing interest, where the sum looked like a stock or estate yielding termly or yearly profits, they concluded that it was intended as a settlement for the heir, before the act 1641: But at the same time they held, that before it yielded interest, or became payable, it was to be understood moveable; whether because the creditor had not completed his intention of making it bear interest, by letting it lie after the term of payment, or because the judges were willing by that benign interpretation to favour executors and younger children, who by the other rigorous construction were frequently brought to misery, is not defined by our writers: Only it is certain that bonds of their own nature moveable, were always deemed, as to succession, heritable or moveable, according to that rule, until the act 1641, that all such bonds were adjudged moveable, except *quoad fiscum et relictam*; as to which, they remained still under the former regulations. And indeed



deed there could be no question or ambiguity concerning any other kind of right, except moveable bonds bearing interest: For as on the one hand, bills, tickets, notes, &c. behoved to be looked upon as moveable, being only securities for the naked delivery of moveable sums; so on the other hand, infestments, dispositions, and all bonds secured by infestment, must needs be looked upon as heritable, since here was a real security in land for the payment of the debt: And as an heritable bond is equally a charge upon the granter's lands, whether he die before or after the term of payment, since there is no doubt of the granter's intention to burden his heritage with the debt; it seems manifest, that as to bonds so secured, there can arise no difficulty upon the granter's dying before or after the term of payment; and therefore it must be understood, that the rule cited for the pursuer takes place only in moveable bonds bearing interest, agreeable to Lord *Stair's* sentiment, *lib. 2. tit. 1. § 4. p. 163, in principio*, in these words, "But sums only heritable by destination for annualrent, are moveable till the first term of payment of the annualrent be past." But further, it will not be doubted that the creditor and granter's intentions respectively, when expressed, terminate the question, whether sums are heritable or moveable? as is plain in the instance of a bond secluding executors; which, though moveable of its own nature, goes to the heir, even where the creditor dies before the term of payment: And from the same reasoning, it is obvious, that an heritable bond, which of its own nature, and by the granter's explicit design, becomes a debt upon the heritage, must continue a debt upon it, and not upon the executry, without regard to the time of the debtor's death. And the argument is abundantly stronger and more manifest, when the question is considered in relation to the heir and executor of the granter of an heritable bond, than in the case of the creditor's successors: For as to the debtor's successors, it is clear as the sun, that the granter by the precept of feisin burdening expressly his heritage, intended that debt should affect his heir; and whatever influence the creditor's decease before the term of payment might have, in determining the right of succession to the sum, it is plain, the debtor's decease before the term of payment could never relieve the land, or consequently the heir from the burden of the debt. Again, if the question is put concerning the creditor's decease, before the term of payment of an heritable bond; it is pretty plain, his heir, and he only, could serve and obtain himself infest in the lands for the security of the sum: Now, to imagine that the executor should have right to the debt, because the creditor died before the term of payment, and at the same time to suppose, that the heir had right to the lands pledged in security of the debt, is too ridiculous to require an argument to expose it; and it will shew *à fortiori*, that there is no doubt the heir of a granter of an heritable bond, and not the executor, is directly liable.

To which it was replied, If before the year 1641, bonds bearing annualrent were heritable, and yet remained moveable until the term of payment; why should not bonds, heritable by bearing a clause of infestment, but no infestment taken thereon, remain also moveable until the term of payment? The intention of the parties, as well as of the law, to make the sums heritable, seems equally evident in both cases:



cases: For as the taking or granting a bond in such a manner as the law *now* esteems heritable, *viz.* "bearing a clause of infeftment," indicates the party's intention to have the sum heritably secured; so the taking or granting a bond before the year 1641, in such a manner as the law did *then* esteem heritable, *viz.* "bearing a clause of annualrent," equally points out the party's intention to have the sum heritably secured: And as before the year 1641, the party's intention to have the sum heritable, did not render it so before the term of payment; so no more ought it now. As to the argument drawn from bonds, secluding executors; there is a great disparity betwixt bonds, *secluding executors*, and other bonds to heirs and executors containing a clause of infeftment: The former are heritable *ab initio quoad creditorem*, not so much because provided to the heir, as because the executor is expressly excluded; whereas the bond in question is payable to heirs and executors: And the clause of infeftment being but conditional, *sciz.* "failing payment at the term," is not purified till the term is elapsed, and no payment made; and then, and not till then is the sum heritable *quoad creditorem*. But in the *next* place, bonds secluding executors, albeit heritable as to the creditor, in respect of the express exclusion of executors, remain moveable *quoad debitorem*: So that no argument can be drawn from bonds secluding executors, to favour the defender's distinction. As to the *last* argument, drawn from the creditor's decease before the term of payment of an heritable bond; the whole of this is a mistake, for the heir has nothing ado in the case proposed: As the executor has the only right to the sum, (his predecessor dying before the term of payment;) so he alone has right to the accessory security of infeftment: Nor is there any absurdity in this, more than in the case that daily occurs, *viz.* an infeftment of annualrent, where the executors have the benefit of the heritable right, and have a real action of *poinding the ground* for by-gones upon the infeftment, and not the heir. And the reason of all this, lies in the regard the law has to the creditor's destination, and manner how he would have his succession regulate; and in that view considers infeftment as accessory, not as a principal part of the contract.

"It is informed, That the Lords found the bond moveable; and  
"consequently sustained action against the executor."

N<sup>o</sup> XI.

February 1718.

SINCLAIR of Barrack *contra* SUTHERLAND of Little Torbol.

*Usurious Paction.*

**M**URRAY of Clairden and Sutherland of Ham, were conjunctly bound, *anno* 1700, to pay L. 1600 Scots by bond, which came by progress into the person of Sinclair of Barrack. In November 1714, the aforesaid principal sum and all the bygone annualrents being due, Barrack demanded his money from Clairden, and Sutherland of Little Torbol, the representative of Ham the other obligant; but they not being ready at the time, agreed, upon the creditor's su-

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perfeding any demand till Candlemas 1715, to pay him the whole sum, with the annualrents thereof due at that term, and failing of payment, to accumulate all the interests, with the principal sum which should be due at Candlemas, extending to the sum of L. 2854; which accumulate sum was to bear interest from the said term of Candlemas: And in the terms of that agreement, a bond is extended, and duly signed the last day of November 1714; wherein the interest is computed to the Candlemas thereafter, payment of the whole sum is superseded till that term, and the accumulate sum bears interest then, and no sooner. Sutherland of Little Torbol being charged upon this bond, obtained suspension upon the head of usury, in respect that here was a paction, making annualrent bear annualrent before it fell due, expressly against our laws, Lord *Stair, lib. 1. tit. 15. § 8.* near the end; for though accumulations *præteriti temporis* are allowed, accumulations *futuri temporis* are undoubtedly usurious: And there is this reason in it, If pactions be sustained, making annualrents not yet due bear interest, it shall be in the power of creditors directly to stipulate compound interest, by making such a general paction as this, "That every term's interest bear interest from the time it falls due;" which is expressly in the face of the law, that allows only of simple interest. Nor is there any thing in the act 28. 1621, against the suspender; which was only intended to rectify a common abuse of retaining a term's annualrent from the debtor at the time of lending the money: It allows indeed the annualrent to be added to the principal, both to be payable at one term; but it does not permit the annualrent which is added, to be accumulate with the principal into a capital, bearing annualrent after the term of payment.

In answer to this it was observed, That by putting off the accumulation till Candlemas, the debtors, in place of losing, had a visible advantage: For if the principal sum and bygone annualrents due at making the bond the last of November 1714, had been accumulated at that date into a principal sum bearing annualrent from the date, as lawfully they might have been, the debtors would have paid interest for fourteen years annualrents, from November to Candlemas; which interest is saved to them every penny, by putting off the accumulation to Candlemas, notwithstanding the date of the bond. This being premised, if the matter be considered to the bottom, it will be found, that our severe laws against usury, tend only to curb the exorbitancy of lenders of money, who profiting of the borrowers their necessity, would urge them to harder conditions, and higher usury than the law allows: Wherefore it may be taken as a certain rule, "That any paction of what nature soever, is not usurious, or reprobated as such by our law, unless it impose higher interest on the debtor, and harder conditions, than the creditor in law could demand." From this view of the matter, it will be clear, that the argument used by the other party will by no means hold in this case, since the reason of reprobating the provision of annual upon annual, is, that thereby the creditor has by the *primary* and *original* obligation a greater interest than the law allows; whereas in the case now in hand, the creditor has not exacted so much as by law he might have done, by making the debtors pay or accumulate at the date of the bond, as has already been observed: And indeed it would be



be extraordinary to imagine, that the judges by interpretation (for there is no express statute determining it to be usurious) should annul a paction, for the relief of a debtor, when the debtor can complain of no hardship thereby, but on the contrary, must acknowledge himself eased of greater severities, which by law he would be subject to. This much the pursuer has to say upon the head of equity, which must justify him, though he had not the forementioned act to speak in his favours; which at the time of lending the money, and making of bonds, allows the annual to be added to the principal, and of consequence, the whole to bear annualrent after the term of payment; which is precisely the present case.

“ The Lords repelled the objection.”

N<sup>o</sup> XII.

18th July 1718.

JOHN DOUL, Writer in Edinburgh, *contra* the CREDITORS of Young of Winterfield.

*The Characteristic of proper and improper Wadsets.*

**I**N the year 1653, John Hepburn of Waughton, for the sum of 24,500 merks received from Walter Young, dispones to him, under reversion, the lands of Winterfield, with all provisions accustomed in proper wadsets; and after the assignation to the mails and duties, subjoins the following clause: “ And the said John Hepburn of Waughton, binds and obliges him and his forefairs, to make the forefairs acres and lands called Winterfield, to be worth yearly twelve chalders good and sufficient bear; and what shall not be duly paid yearly by the tenants thereof to the said Walter Young, &c. the said John Hepburn shall make the same up out of the first and readiest of the best bear he has paid him out of any part of the rest of his lands, and shall deliver the same to the said Walter, &c. yearly, at the ordinary time for paying the farms and duties in the country, or else shall pay the ordinary price yearly for ilk boll that shall happen not to be delivered: And for the better effectuating thereof, it is hereby agreed, That the said John Hepburn, notwithstanding of the said Walter Young’s being in possession of the said land, and uplifting of the farms and duties thereof, shall have power to output and input tenants at his pleasure, and the said Walter Young shall concur with him thereanent.” John DouL, writer in Edinburgh, having acquired right to the reversion of these lands, intended reduction and declarator of extinction of the wadset, upon this medium, That the reverser here undergoing the hazard of the rents, the wadset is thereby in its nature improper; and the sum for which it was granted, being satisfied and paid by intromission with the rents of the lands, the wadset-right is extinguished.

The defenders observed, That the wadset does not provide, that the reverser shall make the rents of the lands worth the annualrent of 24,500 merks; but only that the lands shall be worth yearly twelve chalders, and that the reverser shall make up to the wadsetter what the tenants



tenants are deficient in paying of that quantity: Now, if it was possible that twelve chalders of victual should, by lowering the prices of grain, or the heightening of annualrent, be less worth than the annualrent of 24,500 merks, the wadsetter ran a risk of having yearly less than the interest of his money; whence they concluded the wadset to be proper from this principle, "That towards constituting a wadset improper, the wadsetter must be secure of the interest of his money, against all chances and dangers whatsoever." And for illustrating this, it was pled, That what frees a proper wadsetter from account, is, his taking the hazard of the rents of the wadset-lands for payment of the interest of his money; that the contract is in effect a bargain of hazard, and that it is but just, that the wadsetter who ran the risk of having less than the interest of his money, should have the chance of getting more, if good fortune or industry did heighten the value of the rents: Whereas, on the other hand, what subjects an improper wadsetter to account, is the paction, in whatever form conceived, that the reverser shall make the interest of his money in all events forthcoming to him; by which, as the wadsetter runs no hazard of loss, he ought to have no chance for gain. This was further urged from the words of the *act 63. Parl. 1661*, and the course of decisions: By that act, towards bringing a wadsetter to account, whose rents exceeded the annualrent of the money lent, it is necessarily required, that he have taken an obligation of the reverser, to relieve him of any hazard of the *fruits, tenants, war or troubles*: By which it is evident, that the wadsetter's undergoing the least chance, his being even unsecure against *famine or pestilence*, is in the eye of the law sufficient to save him from account; because of the principle, that the undergoing any hazard on the one part, ought to entitle the wadsetter to profitable chances on the other. That the Lords of Session, in their decisions, have always had this understanding of the nature of improper wadsets, is evident from the perpetual tract of their judgments since the year 1661; and particularly, that observed by *Dirleton*, 24th January 1677, *Home contra Stewart*, where it was found, that the wadsetter was not liable to count and reckon for the duties and superplus of the wadset exceeding the annualrent, in respect the wadset was a proper wadset; "And the wadsetter was not free of all hazards of the fruits, tenants, war and vastation," though the wadset bore a special provision, "That the reverser was to relieve the wadsetter of levies of horse, feu-duties and ministers stipends." The same was found, *Cunningham contra Dowie*, *decis. 114.* observed by *Newton*; though the wadset bore, that the reverser was to relieve the wadsetter of all public burdens; and though there could be no hazard of fruits or tenants, because the wadset consisted of some grafs at the ports of *Kinghorn*: And the reason of the decision is in these words, "That there were other hazards, *viz.* plague and war, which the wadsetter was liable to, and had no relief from the granter of the wadset." All which is to show, that what the Lords have considered in the question, "If a wadset is proper or improper," was only, whether the wadsetter was secure of the annualrent of his money, free of all hazards; and that the least hazard upon the wadsetter's side, was understood sufficient to make the wadset proper.

Answered



Answered for the pursuer, There is no foundation in law or equity for this position, that if the wadsetter runs the smallest hazard, he is not liable to account: Were it not highly iniquous, where the reverser is taken bound to relieve the wadsetter of fruits, tenants, war, trouble, &c. that the wadsetter shall save himself from accounting for his exorbitant gains, because he has cunningly undertaken some trifling hazard of public burdens, feu-duties, or such like? The law does certainly not indulge such contracts: And whatever difficulty there might be of old, to reduce such *ad arbitrium boni viri*, there is none now, since the act of Parliament above mentioned; which has set an example to the judges from the analogy of that statute, to make all wadsets accountable, in whatever form conceived, where there is any considerable inequality. Where indeed the wadsetter undertakes the hazard of the fruits, which is of all hazards the most considerable, he ought to have his chance of making more of them than the precise annualrent of his money; and where such hazard is undertaken, the wadsetter will not easily be made accountable upon the head of inequality, because of that hazard: And therefore, in general, it may be laid down, "That what frees a wadsetter from accounting, is principally his taking the hazard of the fruits, and subjecting himself to all chances that may hinder these fruits from being effectual, and coming to his hand; in a word, his being stated as a temporary proprietor of the lands, *cum pacto de retrovendendo*; or, which is much the same, having a right of hypothec, *cum pacto anticbretico*; where he has the hazard of losing the fruits by chances, and increasing them by industry." The defenders argue from the act 1661, "That the wadsetter's undergoing the least chance, famine or pestilence, is sufficient to save him from accounting." But the act intends nothing like this: The hazards there mentioned, are all such hazards as prevent the fruits or rents being paid, and coming to the use of the wadsetter; the relief against such hazards, is the relief which the law has looked upon, as that which makes an improper wadset in the nature of the thing, or makes it just that the wadsetter should account: But as to the rising or falling of the price of victual, no law ever took notice of that, as having any influence in the question concerning a wadsetter's being accountable. Next, it is to be observed, That the defenders seem to take it for granted, that if a reverser were not bound to relieve the wadsetter of all the hazards mentioned in that act of Parliament jointly, the wadsetter could not be accountable. But that will not be allowed: The contrary will rather follow from the act, that if the reverser be obliged to relieve the wadsetter of any of these hazards which concern the fruits, the wadsetter is accountable: For these hazards are not *jointly* mentioned in the act of Parliament, but *separately*; to point forth, that a relief from any of these was not consistent with the nature of a truly proper wadset. As to the decisions mentioned; that observed by *Dirleton* is directly against the defenders: For it shows, that what the Lords looked upon as the main characteristic of a proper wadset, was the not freeing the wadsetter from the hazard of fruits; and *è contra*, where the wadsetter is free of the hazard of fruits, and the rental to be made good, that must be an improper wadset. And upon this head it may be observed, That it is a mistake to imagine, that a pro-



per wadset must be liable to all kinds of burdens: It is even consistent with the nature of property, and of a feudal holding, that the proprietor be relieved of certain burdens that might affect the property, such as feu-duties and ministers stipends; and therefore much more consistent with the nature of a proper wadset: On the other hand, where a relief is stipulated inconsistent with the nature of property, it will in most cases be found inconsistent with the nature of a proper wadset; and of that kind, the upholding the rental, securing against the hazards of the fruits, outputting and inputting tenants, certainly are. The other decision from *Newton*, makes also against the defenders, because there was no relief from the hazards of fruits, tenants, &c. And the reasoning in that decision was plainly weak on the part of the reverser, when he pretended there was no hazard as to the fruits, in respect of the situation of the ground being near the ports of Kinghorn. That is not at all what the law regards, whether there be hazard from the situation of the ground; but whether there be a paction to relieve of hazards: There was no such paction in this case; and even in probability, a tenant might turn bankrupt there, as well as in any other place.

It was contended in the *second* place, for the defenders, That the wadsetter, if he be accountable, ought only to charge himself with what he received more than twelve chalders; since the reverser could only be liable for the deficient bolls of the twelve chalders, but not for what the price should be defective of the interest. To which it was answered, That neither can this hold: The reverser's being bound to uphold the rent, makes the wadset improper; and that being once established, the counting must be according to the common rules observed in such cases; the wadsetter must be paid of his yearly interest, and then hold count for the remainder.

“ The Lords found, That *Waughton* the reverser being obliged to  
 “ pay the twelve chalders of victual yearly, free of cess and all  
 “ other burdens; the wadset is thereby improper.

N<sup>o</sup> XIII.

25th July 1718.

The CREDITORS of Auchinvole *contra* the DAUGHTERS of Blair of Auchinvole.

*The Expence in Rankings and Sales of Bankrupt Estates comes equally off all the Creditors.*

**T**HE lands of Auchinvole being sold at a roup, and the daughters of the former heritor being ranked amongst the creditors, the expence of the sale and ranking was divided and proportioned upon every creditor, according to the shares they were to draw of the price. The onerous and stranger creditors alleged, That the whole expence of the sale and ranking ought to affect the share of the daughters, whose preference was founded on bonds of provision, or contracts of marriage, who never could compete with onerous creditors. It was answered, That the expences of sales and ranking were ordered, by an act of sederunt 23d November 1711, to be proportioned and



and divided as has been done in this case: The words are, "That the account of the whole expence be produced before the Ordinary of the sale, and by him considered liquidated, and stated upon the price, at so much upon the L. 100; which is immediately to be paid by the purchaser, and detained by him off the creditors having right, as accords." It was replied, That rule was only applicable to onerous creditors: but provisions to children being *quoad* them to be reckoned gratuitous, they could draw nothing, until the other creditors were paid of all: For as the creditors could recur upon the debtor, if he had purchased a separate estate, in so far as the rents were diminished; so could they recur upon children.

It was replied, When sales were first introduced, the practice was, that the factor of the sequestrated estate advanced the necessary expence, which was allowed in his accounts; whereby the subject of the estate was diminished; and by consequence the whole expence fell upon the last creditor; and often it happened that some creditor was thereby wholly excluded: But the Lords taking a general consideration of the case, they found that rankings and sale were a common benefit to the creditors, and therefore the charges ought to be a common burden, affecting first and last creditor equally and proportionally. And if the grounds of law pled against the daughters were good, the former abuse would still continue; for the first creditor is as much preferable for his whole demand to the second, and the second to the third, &c. as the whole onerous creditors are to the daughters: And the ground of preference to creditors, is the act of Parliament 1621. And it often happens in ranking, that debts reduced upon the said act of Parliament, in competition with more timely diligence of others, and ranked in the next place, do nevertheless bear no greater share of the common expence, than the creditors reducing, and preferred by virtue of the said act. Besides, it is to be observed, that bonds of provision for daughters, or obligations in their mothers contracts, do state these daughters as true and onerous creditors; though others may be preferred on the account of latency, and they are not in the same case as heirs of provision: But they plead upon the general ground of law, That whatever creditor obtains a place in the ranking falling within the price, all must bear their share of the common expence.

"The Lords found, That the common expence did affect the whole creditors in their ranking equally and proportionally, according to the shares they draw of the price."



N° XIV.

29th July 1718.

DAVID WILSON, now of Park, *contra* BELL and GRANT, Executors to the deceased Wilson of Park.

*Bygone Feu-duties are prestable by the Heir, not the Executor of the defunct Vassal.*

**I**N a pursuit at the instance of David Wilson, now of Park, as heir to his brother, against his brother's executors, for relief of certain bygone feu-duties due to the superior out of the estate; it was for the pursuer contended, That bygone feu-duties are of their nature, both in the person of the superior and vassal, considered as moveable, and fall to executors; and also burden them in the same manner as bygone tack-duties: And the difference, with respect to the superior's heir and executor, of feu-duties, from other casualties of superiority which pass to the heir, lies here, that other casualties need declarator, which feu-duties do not. It is certain, in all obligations for annual payments, the bygones before the debtor's decease affect the executor, and so must feu-duties: The reason is, if they had been paid annually, as they ought to be, the executry would *in tantum* have been diminished. This point will yet be more clear, if it be considered how intromitters are liable *personali actione*, at the instance of superiors for feu-duties: In which this difference is established by manifold decisions, That singular successors to the vassal, are only liable for those years feu-duties during which they did intromit with the rents; and if the ground should be pointed for more, would have relief against the former intromitters: *Quæ ratio*, but that the feu-duties are understood an annual burden upon the fruits? If which be, then the feu-duties must come off the vassal's executor who represents him, as intromitter with the bygone rents, upon which the feu-duties are a burden. And accordingly it appears to be the practice, from the records of testaments confirmed by the Commissaries of Edinburgh, that bygone feu-duties are in use to be given up, and confirmed by them.

In answer to this it was pled, That the question here will be, not so much, whether bygone feu-duties are in their nature, and *vi sua*, heritable or moveable? but, whether there is any evidence of the intention of parties, that they should only go to heirs, and be prestable by them? Thus a simple bond, perhaps wanting a clause for annual-rent, though in its nature moveable, if executors be excluded both of the debtor and creditor, without question is prestable only by the heir of the debtor, and to the heir of the creditor: And here it was contended from the nature and design of the feudal contract, that the intention of parties is equally clear, that feu-duties should only be a burden upon, and payable to the heir. The feu contract is entered into, betwixt the superior and vassal, and their heirs allennarly; there is a *delectus personarum* made by the superior, *sciz.* the vassal and his heirs; they allennarly are designed to have benefit by the contract, and they alone must bear the reciprocal prestations, whether of personal



sonal services, or pecuniary payments: So that this case comes to be the same, as if the executors both of superior and vassal were expressly excluded. It is indeed true, that for the greater security of the superior, the law has made his feu-duties not only a burden upon the land, but upon the fruits; whereby intromitters with the fruits are liable for feu-duties. It is also true, that executors will be liable for bygone feu-duties, as well as any other heritable subject; but let us examine, if relief is competent to them against the heir; for there lies the point: And there is no doubt they will have relief, as having paid a debt to which the heir was principally and properly liable. As to the footing of equity, which the pursuer endeavours to put his case upon, *sciz.* "That feu-duties being regularly payable out of the fruits, in so far as the feu-duties are unpaid, in so far the fund of executry is increased; and that the executor ought not to profit by this neglect." The answer is ready, That accidental additions or diminutions of the fund of executry, from the nature of the thing, must affect the executor: If the defunct has changed his executry into heritage, or his heritage into executry, he may do this at his pleasure, and the executors and heirs interests must be regulated accordingly: And hence it is, if one shall enter into a purchase of land, his heir will have the benefit of the purchase, though his executor be bound to pay the price; which is a case as much against the executor, as the one in dispute is in his favours; to shew there is no room for arguments of favour or inconvenience, where the determination is founded upon *media* drawn from the nature of the thing. That feu-duties have sometimes been confirmed in the Commissary-courts, is no surprise; they have no proper interest to refuse the confirmation of any subject; on the contrary, the more executry, the greater composition: But, on the other hand, as an argument that bygone feu-duties have always been considered as belonging to the heir; was it ever doubted, that a charter with a *novodamus* from a superior to a vassal, was a good discharge even for the feu-duties that fell due before the superior's own time? And was there ever a pursuit at the executor's instance, notwithstanding such a *novodamus*? which shews at least the general sense of the nation as to this point.

It is this specialty alone that distinguishes bygone feu-duties, from bygones upon investments of annualrent, and all other *debita fundi*. The law has determined in general, all bygones even of land and other real rights to be moveable, and to go to the executor, unless the contrary be expressed: This determination of the law takes place in bygone tack-duties, bygone annualrents, even where there is investment, &c. because there appears no intention of parties, from the nature of these rights, or otherwise, to make any deviation from the legal succession; whereas from the nature of the feudal contract, there is a *delectus personarum*, the heir *qua* such is chosen by the superior to be his vassal; and, on the other hand, there is none bound in the mutual prestations to the superior, but the heir; the feu-duties therefore are properly his debt, and he can have no relief off the executor.

"The Lords found the feu-duties, by reason they are a debt which  
 "most naturally affect the ground, and do arise from the feudal  
 "contract, the terms whereof the heir is only liable to perform;

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"that



“ that the heir therefore was only liable for the feu-duties, and  
 “ not the executors in relief.”

N° XV.

14th November 1718.

BAYNTON and SCHAW *contra* SWINTON of Lochton.*Bills bear Annualrent without Protest.*

**A** QUESTION occurred betwixt these parties, If a foreign bill of exchange bears annualrent against the acceptor, without being protested for not payment?

And it was argued by Lochton the defender, for the necessity of protest, That though the *act 20. Parl. 1681*, was general, “ That the  
 “ sums contained in all bills of exchange bear annualrent, in case of  
 “ not acceptance, from the date thereof; and in case of acceptance,  
 “ and not payment, from the day of their falling due:” Yet from the whole tenor of the act, it appeared that the same was only to be understood of bills protested. The first clause, which relates to execution, was expressly so, “ That bills protested, &c. shall be registrable within six months to afford summary execution:” The second clause, touching annualrent, was a further effect of the bill’s being protested and registered within the six months, “ That the same  
 “ should bear annualrent from the date, if not accepted; and from  
 “ the falling due, in case of acceptance and not payment:” And so the third clause, which is introduced like the second, with an “ And  
 “ further,” is obviously to be understood only of protested bills, *viz.*  
 “ That it should be lawful to pursue for the exchange, if not contained in the bill, with re-exchange, damage, interest, &c. before  
 “ the ordinary judge:” None of which were ever found due without protest. It was argued, *2do*, That the said clause statuting, “ That  
 “ all bills should bear annualrent, in case of not acceptance, from  
 “ the date; and in case of acceptance, and not payment, from the  
 “ day of their falling due,” could not possibly be understood in the first of these two cases, of any other than protested bills; since without a protest for not acceptance, there is no recourse competent against a drawer.

On the other hand, it was argued, That the clause was general, reaching *all bills*, protested or not protested. Before that act, while the practice of other nations was our rule in the subject of foreign bills, it was controverted whether annualrent was due upon them, or not; which the Legislature intending to determine, did in general terms statute, “ That all bills (*sciz.* all foreign bills, these being the  
 “ only subject matter of the act) should bear annualrent, in case of  
 “ not acceptance, from the date; and in case of acceptance, and not  
 “ payment, from their falling due:” And the clause being immediately subjoined after the restricted case of bills duly protested and registered to afford summary execution, statuting, not that *such bills*, but that *all bills*, &c. should bear annualrent, shewed plainly that both cases were under the Legislature’s view; that they were perfectly distinct, and the one case not to be limited or regulated by the other.



other. Answered to the *second*, For the most part indeed, bills bear not interest against the drawer, unless protested for not acceptance: But the reason is, that the *principal* is not due without a protest; and it must be noticed, that the protest is no way necessary to make annualrent run, but to make the principal due. To clear this, let a case be put, where recourse is competent against the drawer, without protest, for not acceptance; in that case it would reach the annualrent as well as the principal sum: As for example, If there is a draught upon a person not the drawer's debtor, though there be no protest, the party who paid the money will recover it from the drawer, both principal and interest; and therefore the first case in the clause is to be understood of all bills whatever, protested or not, as well as the second.

"The Lords found, That by the *act 20. Parl. 1681*, the sums contained in all bills of exchange accepted, though not protested, bear annualrent from the day of their falling due."

N<sup>o</sup> XVI.

February 1719.

Competition betwixt THOMAS ROME, Merchant in Antegoa, and the CREDITORS of Provost Graham in Dumfries.

*Faculty to burden.*

**I**N the year 1629, George Rome purchased the lands of Clowden, and took the disposition to Thomas Rome his son in fee, and to himself in liferent; with power to him the father to dispoise the lands irredeemably, wadset them, or any part of them; or grant annualrents one or more to be uplifted out thereof, notwithstanding of the fee's being taken to the son. In the year 1635, the said George Rome granted bond to one Ballantine, for which adjudication was obtained of the lands of Clowden, at a time when not only was the debtor dead, but the estate conveyed from the son into the person of an onerous purchaser; and the adjudication by progress coming into the person of Thomas Rome, merchant in Antegoa, a competition arose betwixt him and the creditors of Provost Graham, standing then in the right of the said lands.

And it was alleged for these creditors, That Mr Rome's right flows *à non habente*, George Rome, the granter of the bond upon which the adjudication was led, being only liferenter of the lands of Clowden; and though he had an express power by the disposition, to sell, dispoise, burden, &c. the lands without reserve, not having specifically exercised that power, by granting any infestment upon the land, his personal bond could not affect it, unless Ballantine the creditor had adjudged the faculty from him during his own life; which he did not, but after his death, when the faculty was expired; after which the debt could not become real upon the lands by any adjudication. And here it was observed, that the fee flowed not from the father reserving to himself a liferent, but from a third party; which made rather a stronger case: In a disposition with a reserved liferent, and faculty to burden, &c. it may be thought that the fee is truly reserved,  
in



in so far as the faculty reaches ; but where the fee is disposed to one, and a faculty to burden to another, there the faculty is merely personal, and not the consequence of a fee.

It was answered for Mr Rome, *1mo*, He who has a liferent, with a power to dispose, burden, impignorate, &c. is in the eye of the law *really* fiar, his liferent is an *usus fructus causalis*, and his debts affect the subject, as much as the fee had been *formally* stated in his person. This seems to be an unquestionable principle ; and for that reason, a creditor needs do no more, but adjudge these lands from his debtor having a power to dispose ; and from that moment the adjudication is a real right upon the lands, as much as he had been formally invested in the fee : Nor has it ever been thought, that such an adjudication gave the creditor right only to the faculty *to burden* ; for upon that supposition, the adjudication could not be effectual upon the lands, without some new deed in exercise of the faculty, such as granting an heritable bond or wadset to himself : But that has never been dreamed or practised by any creditor in such a case, for that plain reason, because a liferenter having a power to burden, is always considered with regard to his creditors, as fiar ; and the right of a son, in whose name the fee is expressly taken, does in such a case resolve in a conjunct fee with the father ; and he understood to be conjoined for no other reason, but to save the trouble of a new conveyance, and to exclude the superior's casualties that may fall due by the death of the father. It makes no difference, that the fee was never in the father, but the faculty disposed to him by a third party, who at the same time disposed the fee to the son : A father disposing in favours of his son, reserving faculties, conveys the fee just as much, and in as strong a manner, as a third party, who gives the father the liferent with such faculties, and the son the fee ; and the third party in that case very plainly gives the father as much, as he himself reserves : If indeed the faculty were only given to the father, without any investment of liferent, perhaps there might be more ground for looking upon that as personal ; but where a father is invested in liferent with such faculties, it is equivalent as he had reserved the liferent with the same powers ; in both cases that liferent has the same effect with a fee, except only that it does not transmit to heirs, where the heir of line is different from the person who is made fiar by the disposition. *2do*, Even taking the matter upon the footing of a simple faculty, a person having a power to dispose or burden lands, his contracting debts, is looked upon as a sufficient exercise of that faculty in favours of the creditor, although he do not specifically grant an investment for that debt : And there is a very good reason for this, not only in equity, but according to the subtlest reasoning *in apicibus juris* ; because whoever grants a personal bond, puts it in the power of the creditor to make that debt *real* upon the land by diligence, as effectually as if he granted a disposition for security of that debt : Accordingly, no body doubts but an adjudger has just as strong a right to lands, from the consent of the debtor, as he who obtains a voluntary disposition ; and therefore our practice in this matter is most rational, that he who hath a faculty to burden lands, does effectually exercise that faculty according to the strictest rules, when he contracts a debt ; which debt by the forms and disposition of



of law, can be made a burden upon the lands, without any further deed or consent of his. *3tio*, Allowing the granting a personal bond no exercise of the faculty in favours of the creditor, and allowing that faculty to have died with the father; still the adjudication in equity must be sustained against the son, though led after the father's death: Our law has always been favourable to creditors in competition with heirs and children, especially such of them as are purely gratuitous successors. The father had a power to make his debts real upon his son's estate; the son when he got the disposition, laid his account with being burdened accordingly; and if the father neglected to do what was in his power for the satisfaction of his lawful creditors, his son the donatar ought not to reap benefit thereby: It is enough in material equity, that the father had a faculty to burden; and when the law supplies his neglect, and authorises adjudications to be led after his death, the son is in no worse case, than if the father had exercised his faculty in favours of his creditors; which was a piece of justice he ought not to have refused them. And upon this foundation the Lords have all along walked in their decisions; see 21st June 1677, Hope-Pringle *contra* Hope-Pringle; and a famous case, 16th December 1698, Elliot of Swinside *contra* Elliot of Meikledale; where the debt was even contracted before the debtor's faculty to burden; and therefore could not be understood as an exercise thereof: And yet the Lords found in terms, "That the pursuer's debt being anterior to the faculty, did not put it in a worse condition than if contracted thereafter; and found, that the creditors of a father having a faculty to burden, have the benefit of that faculty *eo ipso* that they are creditors, unless another estate can be condescended upon, which may effectually operate their payment; and therefore found Meikledale liable for the debt libelled, as being far within the value of the sum wherewith the father had a faculty to burden his fee: And resolved to follow the same rule in all such cases that might occur." Here upon the same footing of equity, the son was even made personally liable, though he had not any way undertaken the debts: For since he possessed the fund out of which they were payable, it was no great extension to make him personally liable, for what might be drawn from him at any time by the circuit of an adjudication. And accordingly the precise same thing was found, 18th January 1717, Abercromby of Glasshaugh *contra* Græme of Bucklivy.

Replied to the *first*, If it should be allowed that the father was fiar, and the son only conjunct with him, it will have no weight in the argument; for the difficulty still recurs, how shall one's personal debts be made real upon lands, once indeed in the debtor's person, but now alienated, and no longer in his person, or that of his heir? With George Rome the father's life, his interest in the lands of Clowden *funditus* ceased, so that they did not even remain in his *hereditas jacens*; his son Thomas Rome became thereby absolute proprietor: But upon what *medium* he could be made liable more than any other singular successor, is not seen; not certainly as *heir*, for he did not represent his father; not as *successor titulo lucrativo*, nor upon the act of Parliament 1621; for his succession was anterior to the contraction of the debt. In a word, taking the matter upon this



footing, the father was like one of more proprietors *pro indiviso* in any subject; such a proprietor during the continuance of his property, can burden the common subject with his debt; but whenever that ceases, by his death or otherwise, there is no longer access for his creditors, that have not already established to themselves an interest in the subject, independent of their debtor. To the *second*, replied, One having a faculty to burden, when he contracts personal debt, all that can possibly be implied, is an assignation of that faculty, in so far as it may be a necessary *medium* to establish the debt upon the subject; or in other words, a mandate from the debtor to lead an adjudication: Nor need even this be granted; in a personal bond, there is nothing implied or expressed but a simple obligation to pay; and when an adjudication is led thereon, it is not from any implied consent, but by the justice of the law; which supplying the want of will in the debtor, disposes upon his goods for payment of his debts. In any view, contracting personal debts can never be interpreted an exercise of a faculty to burden; were it so, the consequence would be, that the simple personal debt must be an effectual burden upon the subject; which can never be maintained: And yet there is no evading the consequence, if it be evident, that the *exercising* a faculty to burden, must *produce* an actual burden. If then, the simple contracting of personal debt, can infer nothing more, but a mandate or assignation of the faculty; that mandate or assignation must fall whenever the faculty is extinct, by the death of the person in whom it subsisted; and the case then becomes the same, as it never had been granted. Replied to the *third*, There are no sorts of adjudications known in our law, but against debtors, or their *hereditates jacentes*; to neither of which can the present adjudication be reduced: Whatever favour onerous creditors may have in our law, they can never be indulged in demands directly in the face of principles; and it is against all principles, that one's estate which is absolutely his own without any burden, should be torn from him for the personal debt of another.

It was pled in the *second* place for Provost Graham's creditors, Allowing the contracting of personal debt to be such an exercise of the father's faculty, that the estate could have been affected as long as it was in the son's person; now that the estate is conveyed to onerous purchasers, without the burden of the bond, there is no longer place for affecting the estate in their persons.

Answered for Mr Rome, A faculty to dispoise or burden is truly a burden established upon the fee, and as such, good against singular successors; and whenever the faculty is exercised by contracting even personal debt, it is in consequence of the faculty that the creditor has it in his power, at any time, and against any proprietor, to make the same real upon the estate: Nor has the purchaser whereof to complain, since he purchases with the burden of a faculty ingrossed in the very conveyances, which gives him a full notification of his danger.

Replied for the creditors, It is acknowledged that a faculty to burden, is good against singular successors; so as if exercised in any proper way, will be effectual to burden the estate in whose-ever hands: But it will not follow that personal bonds, which in no proper sense  
are



are exertions of the faculty, will thus affect the estate; for, however it be pled from considerations of equity, that they may be made effectual upon the estate as long as remaining with the son, to whom the estate was purchased by the father's money, personal considerations of that or any other nature can have no place against singular successors for onerous causes, who are in quite different circumstances. In a word, when the father died, the faculty to burden died with him; the fee became thereby absolute even in the person of the son, and conveyed in the same absolute manner to the purchaser: While the estate remained with the son, if it should be granted that the law, upon the account of some personal considerations of favour and equity, would indulge the father's creditor in a power of affecting it for his debt, and so make an adjudication once led, good against singular successors; since the creditor neglected that opportunity, *sibi imputet*; the purchaser who acquired an absolute right is safe, for against him these personal considerations cannot militate.

“ The Lords found the bond granted by George Rome to John Ballantine, in the year 1635, a good ground, whereupon the creditors might affect the said Thomas Rome, son to George the obligant, and the heirs of the said Thomas: But found that the bond cannot affect the singular successors of the said Thomas in the lands of Clowden.

N<sup>o</sup> XVII.

July 1719.

Sir JAMES CARMICHAEL of Bonington *contra* CARMICHAEL of Mauldsly.

*Compensation not proponable upon a prescribed Debt.*

**S**IR JAMES CARMICHAEL pursues Mauldsly upon several grounds of debt, owing by Mauldsly's predecessors to his predecessors; Mauldsly propones compensation upon greater sums due by the pursuer's grandfather to his predecessor, as executor confirmed in a testament made by Captain John Carmichael, anno 1644, wherein he nominates his two brothers, Sir Daniel and Sir James Carmichael's, predecessors to the parties in this process, his executors, and wherein Sir James the pursuer's predecessor was the sole intromitter. It was objected for the pursuer, That this reciprocal claim founded on the testament, was prescribed by the lapse of forty years, no document having been taken thereon; and being thereby extinguished, it could neither be the foundation of an action or exception.

It was answered for the defender, That the nature of compensation is such, that where there is a concurrence betwixt two debts, there necessarily must arise a mutual extinction; and if once there be an extinction, then without doubt, the allegiance that the debt pursued on is extinguished, must be competent to the defender at any time when that extinguished debt comes to be pursued upon, or any other way brought in judgment against him: It is very true, that where there is a mutual concurrence of debts, there is a double effect; each party, if he pleases, may pursue upon his own debt, and oblige the other  
either



either to pay, or to take the benefit of the compensation; and that other has it again in his option, whether he will make use of the benefit of the compensation, and propone the extinction, or if he will neglect it, and pay the debt pursued for: But then he cannot do this without the other's consent, because that other, if he will, may force an extinction, by insisting to have it declared, That from the time of the concurrence, the debts were mutually satisfied; the force of which conclusion the other party cannot evade. But if both parties expressly, or tacitly agree, That the debts shall not mutually extinguish one another, then indeed the concurrence has not its legal effect: But still it is plain, there is really an extinction *ipso jure*. In the same manner the exception of payment itself may be passed from, where both parties agree to it, and where there is no *medium impedimentum*, or damage arising to a third party: So if a discharge be granted, that discharge may be passed from and delivered up, and the debt continue a good debt; and of late years it was found, that where there was a renunciation granted of an infestment, that renunciation might warrantably be given up, and the old infestment take place, there being no *medium impedimentum* or after creditor prejudged. All this is to prevent an objection, as if compensation could not operate *ipso jure*, because it may be passed from; for so may any other instruction of payment. Nor is there any inconsistency in what is commonly said, That compensation must be proponed, otherwise it has no place; for it must be proponed, not in order to make the extinction, but as the lawyers express it, *ad manifestandum*, and, in order to have the extinction, which had before taken place, ascertained by a legal sentence; and so the matter is very well explained by the learned *Voet, tit. de Compensationibus, num. 2.* This then being the nature of compensation, it is not conceivable how the prescription of any one of the concurring debts, should take away the benefit of the exception from the creditor, since at proponing the exception he does not found upon the debt as a subsisting debt, but as a document of the extinction of the other debt.

It was replied for the pursuer, That in our law, compensation operates not *ipso jure* upon the mutual existence and concurrence of the debts, until the ground of compensation be proponed and applied; then indeed it operates *retro*: But till proponing, the mutual debts remain unextinguished. For the more full understanding of this scheme, it is to be observed, compensation is not by our law allowed in the same extent that it was in the later times of the Roman law. The learned *Vinnius* observes, in his Commentary upon the Institutes, *tit. Action, § 30.* That the privilege of compensation was at first only introduced in *bonæ fidei judiciis, ex bono & æquo*; thereafter, by the constitution of *Divus Marcus* allowed in *stricti juris judiciis, oppositâ doli mali exceptione*; and lastly by *Justinian*, introduced in all cases *ipso jure*. It is adopted by us in the middle way, *oppositâ exceptione*; which the statute, *Ja. VI. Parl. 12. c. 143*, in terms bears, "That any debt " *de liquido in liquidum*, before giving decret, be admitted by all judges within this realm by way of " exception; but not after the giving thereof in the suspension, " or in the reduction of the same decret:" And so indeed is introduced no otherwise but as a *reconvention* privileged to be propon-

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ed by way of exception; for of its proper nature it is not even an exception, as Lord *Stair* observes, where he says, "It is neither payment formally nor materially:" For when a creditor borroweth from his debtor, and obliges himself to pay at a day, a mutual credit arising, from the nature of the thing, affords no exception against payment, but each party must insist for his own claim. Accordingly compensation has place only in these countries where it is introduced by statute, or where the Roman law prevails, and had no place with us before the act 1592; and established by positive law, for utility's sake alone, to shun multiplicity of pleas, upon the principle, *Frustra petit quod mox est restitutus*. Hence it is that the effects of compensation are not so full in our law, as with the Romans; for among them it was competent after sentence, *l. 2. Cod. Compensat.* not so with us: When one paid who had a ground of compensation, he had a *condictio indebiti*; which would not obtain with us: Horning is not taken away by compensation, by a sum due to the party denounced, equal to that in the horning, not being actually applied by process or contract, as Lord *Stair* observes, *l. 3. t. 3. § 12.* which yet it would, did compensation extinguish *ipso jure*. And indeed the rule is general, that where a debt is not taken away *ipso jure*, but only *ope exceptionis*, the debt still remains unextinguished till the exception be proponed; and at the time of proponing, the validity of the exception is to be considered.

Duplied for the defender, To hold that compensation operates not *ipso jure*, is to go against a principle: For if it has no effect before it be proponed, how could it stop the course of interest? relieve a cautioner? be good against an assignee even for an onerous cause? or against an arrester arresting after the concurrence? These are all *media impedimenta*, such as would hinder the proponing of compensation, if it was to take effect only from the time of proponing, and not from the time of the concurrence. Nor is the observation of any use, that by express statute, compensation is not admitted after decret: An act of Parliament might have appointed that a discharge should not be received after a decret, and might have left the party discharged, to his action of repetition *indebiti condictione*; but that would not have altered the nature of payment, or hindered it to be an *ipso jure* extinction. No more does the statute founded on, alter the nature of compensation; it bars indeed the proponing of it after sentence; and so in that case, the act of Parliament has the same effect, that the mutual consent of parties renouncing or passing from the compensation would have: But still the nature of the exception remains the same, and when warrantably proponed, must operate *ipso jure*, so as to extinguish from the time of the concurrence.

Triplid for the pursuer, Though compensation is proponable against assignees, voluntar and legal, and that *retro* the *curfus usurarum* is stopped; that is no proof of its operating *ipso jure* before proponing: For, as to the first, it arises from another rule, *viz. Quisque utitur jure auctoris*; what is competent against the cedent, is competent against the assignee, because assignees and arresters are only mandatars *in rem suam*; they act in their author's name, and upon his right, and must consequently sustain all objections competent against him. *Vide Stewart and Nisbet, voce Exception.* And the other of operating *retro*, is *ex officio judicis* from the equity of the thing, and not at all *ipso jure*.

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Quadruplied,



Quadrupled, Though the old style of assignations runs as they were only mandates, yet in our present practice, assignation with intimation is looked upon as a complete conveyance *funditus* denuding the cedent; the assignee accordingly can act in his own name, and the cedent must be reinstated in his former right, upon the medium of a new conveyance from the assignee; which are each of them demonstrations, that an assignation is somewhat beyond a mandate, and no less than a complete conveyance.

There was a separate ground insisted on for the pursuer, in this shape, That allowing compensation operates *ipso jure*, yet the testament pretended to compensate on, being prescribed *quoad modum probandi* by the lapse of forty years, there was no legal evidence remaining, that ever there was such a debt, that ever there was a concurrence, or mutual extinction: For it was pled in general, That all obligatory writs prescribe, and are not *instrumenta probatoria* after forty years. To which it was answered, *1mo*, The law has not said so. *2do*, It is not conceivable how it can be so, That a writing completed with all solemnities that law requires, should be probative to-day, and not to-morrow: It does indeed sometimes happen by force of express statute, that a writ not having all the solemnities which law requires, should after such a limited time need to be further supported, as happens in the case of holograph writs; but it never was heard, that a deed fully complete with all its solemnities, should not be probative after currency of whatever number of years.

“ The Lords found, That compensation cannot be proponed upon a debt after running of the forty years prescription.”

N<sup>o</sup> XVIII.

January 1720.

WALKER *contra* MACPHERSON and FORRESTER.

*An Adjudication through Informalities being reduced to a Security, the Intromissions bad, medio tempore, are imputed in extinction thereof.*

**A**N adjudication of a tenement, by progress in the persons of Macpherson and Forrester, having been restricted to a security, at the instance of John Walker, merchant in Edinburgh, because more was adjudged for than was due; the pursuer contended, That the adjudication was extinguished by the defenders and their authors intromissions, even these had after the legal reversion of ten years; because the adjudication having been found only a right in security, and the legal still open, it must be extinguishable by intromission, whether the original creditor intromit, or his singular successor; for such is the nature of rights in security and payment.

The defenders pled, That possession having been attained after the legal was expired, the *fructus bona fide percepti et consumpti*, while they had reason to believe themselves proprietors *unaccountable*, could not be imputed to extinguish the principal sums in their adjudication; which in this case would be particularly hard, because if they be bound to account, it must be by a rental; and, mean time, possessing *tanquam domini*, they have neither preserved vouchers or documents of



of public burdens, reparations, wastes, bankrupt tenants, &c. to diminish the same. If then the pursuer's plea obtain, no man shall ever possess quietly or securely upon an adjudication; for it will not be said, that the law ties an adjudger to keep accounts of his actual intromissions, dead, waste and poor for ever; and yet no man can be secure, but minorities may interrupt for a long time beyond the course of prescription, during which, an adjudger, or purchaser of an estate from an adjudger, (and many estates in Scotland, have no other foundation), shall not know whether he is master of an opulent estate, or if he is not worth a shilling in the world.

To which it was answered, That while the pursuer pleads *extinction* only, and not *repetition*, he pleads nothing inconsistent with the *bona fides* of the defenders; which will be plain, by taking a view of the effect of *bona fidei* possession in voluntar rights. Where one purchases a voluntar irredeemable right, and upon the faith of its being an effectual purchase, pays the price; another appearing, and excluding him with a better right, his *bona fide* possession can have no other effect, but to exclude repetition of what he has uplifted and consumed: His price is lost, unless he can recover it off his author upon the warrantice; and all he can plead, is, to retain what he hath *bona fide* intromitted with: It is the same when an adjudication is purchased, which is afterwards excluded by preferable diligence. If then this be the only effect of *bona fides*, when the right acquired is excluded by a preferable right; For what reason should it have a further effect, when one has laid out his money upon the purchase of a right that of its own nature is extinguishable, and is by intromission actually extinguished? When it is found extinguished, he is in the same case that the *bona fidei* possessor is, whose right is excluded by one preferable; he loses his price, and is only saved from repetition of what he has intromitted with and consumed. Hence, it is evident, that the benefit pled by the pursuer, of having his debt extinguished by intromission, which arises from the nature of the right, does noways lessen or encroach upon the favour allowed to *bona fidei* possession: For still the *bona fidei* possessor is in the same state he would be, had he been excluded by another right; and consequently has all the benefit of his *bona fides*, though his intromissions be imputed in extinction of his adjudication that *bona fides* gives in any other case.

It was replied for the defenders, They lay not their defence here simply upon their *bona fides*, but upon the nature of their intromission: When one intromits by virtue of a right in security, which he *bona fide* considers as a right of property, the intromissions cannot impute in *extinction* of the right, for these reasons, That it is not the *fact* of intromitting in any case that extinguishes the right, but the creditor's intromitting in virtue of that right; and as having such a right, his *application* of the intromissions thereto: Just as in the common case of payment, it is not the debtor's telling over the money that extinguishes the obligation, but the creditor's acceptance *in solutum*. Thus one having a right in security, which leads him to intromit, if he intromit not as in that right, but as in some other right, or perhaps as doer for another, or as *prædo* without any right at all; however he may be accountable for his intromissions, they cannot directly impute to the *extinction* of the right upon which he did not intromit.



tromit. In this case, indeed, the intromission was had in virtue of that right itself, which is craved to be extinguished by the intromission; but still, since the intromitter took himself to be proprietor, and never considered his right as in security only, and therefore never once dreamed to make the *application* of his intromissions to the *extinction* of that right, either *animo*, or by any other external deed; it may be thought that it comes to the same, as if he had intromitted by any separate right; the bare *fact* of intromitting, signifying nothing, the *animus*, the design of the intromission being necessary to be considered, without which there is no *application*, and consequently no *extinction*.

“ The Lords found the intromissions imputable.”

N° XIX.

23d June 1720.

Competition BARCLAY of Towie, with the other CREDITORS of Crimonmogat.

*Adjudgers within Year and Day, brought in pari passu after Expiry of the Legal, as well as before.*

**T**HE lands of Crimonmogat, belonging originally to John Hay, were apprifed by Peter Meldrum in the 1654, and in the same year by Towie's grandfather; and Peter Meldrum stands infeft on his apprifing under the Great Seal. Meldrum the apprifiser, in the 1675, disposed to Mr William Hay, who was infeft in the 1677, upon Meldrum's resignation; Mr William Hay, or his son, contracted debts, whereupon diligence going on against him, there ensued a ranking and sale of the estate: In which process, compeared Towie, and craved preference upon his grandfather's apprifing, which had been long neglected, through the misfortune of successive minorities of his grandfather, mother and himself; and his ground of preference was, That the creditors their rights depended upon Peter Meldrum's apprifing, who was their original author; and that Towie had right to come in *pari passu* with this apprifing, as being within year and day thereof.

The creditors pled, That Towie's apprifing never being completed by infeftment, claiming only upon the act 1661, the benefit of Meldrum's apprifing and infeftment, cannot now so long after the expiry of the legal, compete with singular successors, possessing by heritable rights conveyed from the first effectual apprifing whereupon infeftment had followed.

It was alleged for Towie, That the infeftment on Meldrum's apprifing, was, by the law, just one, as it had been upon his own; in which case, the competing creditors could not controvert, that he would come in equally with them, notwithstanding of their deriving absolute real rights from Meldrum, who could give none better than he had, since the Lords have found, that the right was not excluded by prescription.

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It was answered for the creditors, That the act 1661, was only intended to regulate the competitions of apprisers during the legal; and that the nature of the right after the legal, or the consequences thereof, was noways altered, but left *in statu quo prius*: So that whoever is found to have the first infestment after expiry of the legal, whether led during the currency or thereafter, has thereby an absolute title of property, exclusive of all the other adjudications, though led within year and day. Which seems plain from the act 1661 itself, particularly the preamble of the clause, which gives the reasons for the statutory part: A creditor living at a distance, was prevented by the more timeous diligence of other creditors; so that the preference depended upon mere chance, and not upon the negligence of the other creditors; this is regulated by preferring *pari passu* all creditors doing the same diligence within year and day. The preamble further says, "That posterior comprisers had only right to the legal reversion, which does often prove ineffectual to them, not being able to redeem within the legal." Here the time during the currency of the legal is only in view; the inconveniencies arising to creditors during that time, is the motive of the statutory part, and these are effectually prevented, by giving opportunity to the co-appriiser, to recover his payment within the legal, or to do such diligence as may prevent the expiring thereof; which, without using orders or declarators, he may do by a simple suspension, or summons of multiple-pounding, where the creditors will be obliged to produce their interests; and this continues the legal, at least prevents one creditor's taking advantage of another upon the expiration.

Replied for Towie, That an infestment upon an apprising after expiry of the legal, is no more exclusive of other apprisings, than during the legal. It was never before questioned, but that infestment *quandocunque* taken, did accresce to the remanent apprisers within year and day: As for example, three persons apprise or adjudge, but the last without year and day of the first; if the first shall infest after expiry of the legal, it will accresce to the second, in exclusion of the third; and yet if the third should first infest, though the legal of the first be expired, they will all come in *pari passu*, because by the act of Parliament, the last is *the first effectual*: For the law considers not whether the apprising be expired or not, but in general *the first effectual apprising*; and if the apprising be not made effectual till after expiry of the legal, still as to all apprisers and adjudgers within year and day, it is a right to be communicated. And here is the mistake of the creditors; an apprising after expiry of the legal, even without infestment, turns to be a right of property in a question with the debtor; but in competition with co-apprisers, they are no more but so many several creditors *missi in possessionem*, and by the law, the deed of one accresces to the rest, especially as to the matter of their infestment, which by the statute is designed to be a common right: And if it were otherwise, the inconveniency would be great; for whereas now adjudgers often rest upon a charge against the superior, or infestment taken by any of their number, every one for their security, behoved to take charters during the legal for themselves, since otherwise they would be cut off by the first infestment that should exist after the legal, which would create the utmost expence.

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It was urged for the creditors, in the *second* place, That if Towie prevail, it shall then be unsafe to purchase from any who has right by apprising, or even from persons who have absolute rights; because perchance some time or other they might have been founded on comprisings: Now the great design of our lawgivers all along has been, to make onerous purchasers secure in all events; which in a great measure must be disappointed, if Towie's apprising be sustained, there being no records to show incumbrances by apprisings.

To which Towie answered, *Incommodum non solvit argumentum*; no law can be made so perfect to meet every inconveniency: But if this argument obtain, then apprisings hereafter in the persons of singular successors shall not be reducible upon nullities, or even upon payment made to the disponent. But the answer is obvious, Every one who purchases upon an apprising, has an open intimation made to him, that he is purchasing *cum periculo*, and particularly with this, that he may have competing apprisings; it is a rare example, that an estate is carried off without more than one: So that the very nature of the right speaks loud to him, without another certification. Besides, our law has afforded public records, whence purchasers may be certified of apprisings; for by the act 1661, allowances are introduced; and before that time, as appears by that statute, apprisings were in use to be fully recorded and registered, which was a full notification.

“ The Lords found, That the privilege introduced by the act of  
 “ Parliament 1661, in favours of adjudgers, before, or within  
 “ year and day of the first effectual apprising, is competent to  
 “ the said adjudgers, before, or within year and day, against  
 “ the singular successors of the first effectual appriser, as well  
 “ after the expiry of the legal, as within the same.”

N<sup>o</sup> XX.

19th November 1720.

RICCART *contra* RICCARTS.

*Collation amongst Heirs-portioners.*

**R**ICCART having tailzied the far greatest part of his estate, in favours of himself and the heirs of his body; which failing, to the eldest heir-female without division: And having only three daughters, the eldest daughter and her husband pursue a declarator against her two sisters, That she had right not only to the tailzied estate, but likewise to a third share of an untailzied heritable estate, as heir-portioner with the defenders; as likewise, that she had an equal interest in her father's moveables, as one of his nearest of kin.

The Lords made no difficulty as to the pursuer's equal share in the untailzied estate: But as to the executry,

It was alleged, That the pursuer being heir of tailzie, had no interest in the moveables, from which the heir is always excluded, unless he collate; and albeit in this case there be an untailzied estate of small value, yet the bulk of the estate being tailzied, the pursuer's  
 interest



interest in the moveables is in point of law the same, as if there had been no untailzied estate: In which case, the succession of moveables would belong to the younger sisters, excluding the eldest as heir of tailzie; otherwise there would be a very notable disproportion betwixt the succession of the pursuer and defenders, whose relations to the defunct are equal: And in this case, the value of the tailzied estate is so great, that she would not collate, nor could she by the quality of the tailzie.

It was answered, That the succession to heritage and moveables generally descends in different channels: The law prefers a son or heir-male to females in the same degree of relation, in the succession of heritage, and prefers the younger sons and daughters equally to moveables and executry; which are not presumed to be so valuable as heritage: But when it happens otherwise, that the heir reckons his share of the moveables better, he has access to a share of the executry, on condition that he collate his heritage with the executors. But in this case, where the nearest degree are all females, there is no preference, but the law brings them all in equally, both as to heritage and moveables *ab intestato*; but in so far as the father by a tailzie has preferred one of the daughters, she succeeds in that estate by the will of the father, who was pleased to exclude heirs-portioners; and as to the rest of his estate, it descends *tanquam ab intestato*, and is devolved equally to all the daughters, and there is no different channel of succession amongst daughters, either as to heritage or moveables, and consequently no exclusion of an heir, because there is no privilege to elder or younger daughters as to heritage; and the exclusion of the heir from the moveables is properly *ab intestato*, where the heir-male is preferred in the heritage to the younger sons or daughters. It is true, if a tailzie were made in favours of the heir-male, who would have the preference *ab intestato*, the express will of the father, would not alter the destination of law as to the moveables, which was left to the legal succession: But suppose a father should tailzie his heritable estate to a second or third son not *alioqui successurus*, such an heir of tailzie, would not be excluded from his share of the moveables, as nearest of kin.

“ The Lords found, That the pursuer and defenders being equally  
 “ entitled to the succession of heritage and moveables *ab intestato*,  
 “ the tailzie did not exclude the pursuer from her legal claim  
 “ to the executry.”

N° XXI.

29th December 1720.

HELENOR EDWARDS, Merchant in London, *contra* KATHARINE PRESCOT of London, now Residenter in Kelfo.

*Foreign Decrees, how far effectual here.*

**K**ATHARINE PRESCOT being lodged in the house of Helenor Edwards, a fire broke out (as was alleged) in Mrs Prescott's chambers upon the 15th October 1706, by which the house, &c. was entirely consumed. By the common law of England at that time, the person



person in whose house or chamber a fire happened, was obliged to make up the damage done in or upon the said house, without burdening the plaintiff with a proof of the defender's fault or neglect; the law presumed, *Incendium culpâ inhabitantium fuisse ortum*. Upon this law Mrs Edwards brought an action against Mrs Prescott before the Court of Queen's Bench, as she in whose chambers the fire broke out: And issue being joined upon the fact, the jury brought in their verdict for the plaintiff; and accordingly a decree was pronounced against her for *L. 240 Sterling*. To evade the effect of this decree, the defender retired into Scotland: But the pursuer having also laid an action against her here, founded upon her English decree, the question occurred, "If an authentic extract of a decree of the Queen's Bench, ought to be sustained as *probatio probata* in Scotland, upon which execution must be decerned, unless it be shown contrary to the law of England; or if it is only to be sustained as a libel?"

The pursuer insisted, That the vouchers produced being found probative of the judgment, it was competent for her to plead the same as *res judicata*; the merits whereof could not again be canvassed by the Lords of Session. The Court of Queen's Bench is so far supreme, that the judgments or decrees thereof are subject to no review, but of the House of Peers; and not of that either, in what concerns the proof of matters of fact; no record being kept by which the Lords can judge of it: Therefore the decrees of that Court, as being the final sentences of a supreme judicature, whether taking the case upon the general foot, as the decree of a supreme court, of however a distinct and separate nation; or more especially, as the judgment of a supreme and independent court under the same Sovereign and Legislature, which affords some separate views, to be hereafter noticed; the Lords ought to sustain the same as a valid ground of debt upon the person now under their jurisdiction, and without any review (which implies a subordination) decern upon it for execution. In support of this it was urged, That where any person comes under an obligation, valid and binding by the laws of the country where it is contracted, whether the same was by voluntary contract, or by the final judgment of a supreme court in the jurisdiction in which it was pronounced, the supreme court of any other however distinct and independent country, is by the law of nations obliged to interpose its authority for making the same effectual, either against the effects of the person which may be found under their jurisdiction, or against both person and effects, where it happens, as in the present case, that he withdraws himself from the place, by the laws of which he had become bound, and where execution against him must have been unavoidable, under this limitation always, "Provided no prejudice did thence arise to the jurisdiction, privileges or laws of the place where performance of the obligation is pursued, or the decree craved to have execution." That this rule holds universally in obligations is beyond question; nor is any country more observant of it than ours: A bond or contract granted in France, England, or any where else, liable to no exception from the law or forms of that country, is sustained with us, however defective in these solemnities that our customs require: Executors are allowed to confirm English testaments,



ments, and the like; instances whereof are so frequent, that to mention particular cases were unnecessary. Nor can this be founded upon any principle of law or reason, which will not equally plead in support of the final decree of a supreme court of a distinct country, *at least in civil cases*, as inferring a valid debt upon the party against whom it is pronounced; which will be otherwise evident from this consideration, that litiscontestation is in effect a contract, by which parties do agree, that if the fact shall be proved, the defender shall subject himself to the conclusion of the libel; and upon that ground, the decree here founded on, may justly be considered the same, as if the party had granted his bond for the sum therein decerned; and therefore execution falls to be given upon it by a new *decerniture*, against the defender for the sums therein contained, without any re-examination of the merits of the cause, which can be competent to none, but such as are of a superior jurisdiction to the court that pronounced it. If now the foundation of this law of nations be enquired into, it will be found to be the expediency of the thing, and the common conveniencies that arise to nations, as they are distinct people, by the observance of it: Mankind being so far bound together, as into one society, that they ought to be assistant to one another in such things as do not hurt or prejudice their own rights and privileges; from whence it is, that what we call the law of nations does arise, where by a tacit consent, implied in mutual advantage and expediency, nations become mutually engaged to perform these offices to one another. The doctors, particularly the practical writers, have most of them treated this question of the effect of decrees of different jurisdictions, and upon the very reason now given, generally agree, that the same obtains in both contracts and decrees; but carrying the matter still thus much further in the case of decrees, that the court from whom execution of them is demanded, ought not to examine into the merits of the cause; but that *pro justitia sententiæ et conformitate ejus cum legibus loci ubi pronunciatum est, præsumendum sit*. It is true, where they treat the question as betwixt two nations absolutely distinct, they seem to require the *literæ rogatoriæ*, or *requisitoria* as they call them; but which cannot be necessary in an united kingdom, such as Scotland and England, as we shall prove by and by: See *Faber's Rationalia*, ad l. 75. de jud. *Mynsinger. Observat. cent. obs. 69. Gail Obs. l. 2. obs. 130. n. 12. et 13. et l. 1. obs. 113. n. 8.* These authorities do indeed carry the point further than the pursuer has occasion in the present case to plead, *sciz.* That the Lords in such a case are without enquiring to presume for the conformity of the sentence to the law of the place: She has all the assurance can be had, that her decree is without fault, when the Lords shall please to examine it by the laws of the country, and forms of the court where it was pronounced; and has occasion to plead no further, than that supposing her decree to be unexceptionable conform to the law of England, it ought here to be sustained as a valid ground of debt, which the aforesaid authorities do *a fortiori* conclude. Indeed in all these cases, the limitation above allowed is still to be taken alongst, That there do not thence arise any prejudice to the laws or jurisdiction of the distinct people; and as this will obviate any authorities that may be adduced for the contrary of what is here pled, it is like-



wise evident, this action does noways tend to impinge upon this limitation. The pursuer does indeed agree, that no law of England, or any other country that is inconsistent with the law of Scotland, can by virtue of the decree of any court take effect in Scotland: But it is quite a different thing, where only the law of England statutes what is not provided by the laws of Scotland; for a decree upon such a law may very well take effect here, and yet nothing follow inconsistent with our constitution, or encroaching upon our jurisdiction. The thing will be plain by an example: Suppose a sentence was pronounced in England, upon a testament which contained lands and heritages in Scotland; no such decree could be effectual here, with relation to these subjects which by the law of Scotland cannot be conveyed by a testamentary deed; for that would be an encroachment upon our constitution: But where only the law of England provides what is not provided by the law of Scotland, there is no reason why a decree on such a law should not be sustained in Scotland, more than an English bond, which is null by the Scots form. Again, suppose by the law of England, tacks clad with possession are not good against singular successors, and that by a decree obtained in that country at the instance of the purchaser, the tenant had been decerned to remove, and pay costs of suit; to be sure this would be a decree proceeding upon a law not agreeable to the law of Scotland, and yet it could not with any propriety be pretended, that the giving authority in Scotland for putting the decree in execution for these costs, were any encroachment upon the laws and constitutions of this country.

The pursuer, in the *next* place, endeavoured to lay down the specialty of the case betwixt Scotland and England, in questions of this kind. The Union, he urged, has in this matter made a great alteration: While there was only an union of the Crowns, and the nations only united *ad fidem*, they were still as foreigners with respect to one another, and cases between them regulated by the laws of nations; which, though they are binding, (as above is proved) that obligation is rather *comitatis* than *necessitatis*; and so the *literæ requisitorie* are used among distinct nations: But now that we are not only united *ad fidem*, but come under the same legislative, and have the same ultimate resort of justice; the mutual assistance of the several supreme courts, who have jurisdictions independent of one another, is become *necessitatis*, and so needs not be requested as a favour; seeing if such mutual assistance were not given, the affairs of the subject would be inextricable. And thus the case is now become the same, with respect to this mutual assistance betwixt the supreme courts of England and Scotland, as it always was in Scotland betwixt two of its supreme courts, *viz.* of Session and Admiralty: Should the executorial of poinding, or the like, be directed against a subject lying within the Admiral's jurisdiction, upon a decret of the Lords of Session; it seems to be plain, that the poinding could take no effect against the subject upon the Lords authority, which extends not to the sea; but needs the interposition of the Judge-admiral to make it effectual: And this is notour to be done every day there is occasion for it: Nor is it thought the Admiral can refuse it upon application of the party; not that this anyways flows from his being subject to the Lords jurisdiction, of whom, being a supreme Judge, he is independent;



pendent; but from the nature of the thing, being absolutely necessary for explicating the affairs of the subject; which, upon the precise same reason, is no less necessary to be observed amongst all the independent courts under the same Legislature; still under the above limitation, That the laws peculiar to these independent jurisdictions be not encroached upon. The case of Holland may here not unfitly be applied: *Voet*, § 41. *ad tit. Re judicat.* states the difference betwixt the case of distinct nations and these under the same Legislature, That in the first, the mutual assistance of one another is *comitatis* only; but in the last, that it is *necessitatis*; and that particularly it is so in Holland, enjoined by order of the States. To conclude this head, the pursuer shall endeavour to set forth distinctly the necessity she is pleading for, by an example: Let it be supposed, one should obtain a decret in England, before the Court of King's Bench, (from which Court there is no appeal, but to the Parliament of Britain;) the person against whom the decree is obtained, withdraws to Scotland with his whole effects; suppose the pursuer's mean of proof, upon which he obtains his decree, be lost, perhaps by the death of witnesses; by which a new suit commenced before the Session should be fruitless: A process therefore is commenced before the Session upon the decree, as in the present case, as a ground of debt, which the Lords of Session find not probative; this decree of the Session goes to the Parliament by an appeal: It is very certain by the rules of the House of Peers, that had the original decree been appealed from to their Lordships, they would not have overturned it, for the reason already said: How then is it to be supposed, that they can support a decree of the Lords of Session, when gone before them by way of appeal, rejecting, and in effect overturning a decree of a court in England, which the House of Peers could not by their own rules have overturned, had the appeal been directly lodged before them against the English decree itself? This, and other views which have arisen from the late change in our constitution by the Union, by which we are come to have the same legislative and ultimate resort of justice, must necessarily put us upon a different footing from that of perfectly distinct nations. As the law of nations, properly so called in contradistinction to the law of nature, had its rise by degrees, as experience discovered the common expediency of things; so the present circumstances of our constitution discover so much reason for what the pursuer now pleads, that it is hoped the Lords will be of opinion it ought now to take place, whatever had been the former custom.

In answer to this pleading it was observed, in the *first* place, for the defender, That the constitution, the laws and judicatures of the two nations have no authoritative force in the other, no more than a judgment of any supreme court of France or Germany has in Britain. In the *next* place, Though a judgment recovered in one nation, has no authoritative force in another; yet sometimes it happens *ex comitate*, out of that respect which nations by common consent entertain for decrees pronounced in the sovereign courts of each other, that a judgment recovered in one kingdom, may create a debt which may be prosecuted in another. But then it was observed, that as this custom of nations was introduced purely on account of equity, and for the encouragement of commerce, that a person who justly  
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was debtor, and so found to be by judgment in his own country, might not with impunity defraud his creditors by retiring to another; wherever equity and justice did not support the judgment, so as upon the claim judgment might have been recovered in the country where the party was attached, the comity or respect to the foreign judgment ceased, and there followed no interposition of authority on it for execution. Hence, when a sentence is pronounced for punishment of a crime in one country, it cannot be put to execution in another; and for the same reason, when a statutory penalty or mulct is by judgment of one nation awarded for a fact, which is not of its own nature penal or criminal, no execution can be had on such judgment in another nation. To apply this, it was observed, that the foundation of the judgment in England, was a particular law in that country, penal in itself, and which had no effect in Scotland. That a person who is undone by fire, should be punished with the losses of other people, purely because this fire casually broke out in his house, is a penal severity, legal indeed where the law so provided it, but without any foundation in the law of nature or nations; because common equity does not inflict a punishment where there is not fraud, or gross faultiness equal to it: And this the English themselves were so sensible of, that this very decree gave occasion to an act of Parliament, the 6th of the Queen, abolishing that law: And as it is not the law of nature or nations, it is not the law of Scotland. Let it then be supposed, that Mrs Prescott had, before the judgment recovered against her in the Queen's Bench, retired into Scotland; and let the question be put, Whether a suit carried on against her for the same facts for which she was prosecuted in the Queen's Bench, could have produced a decret? It is plain it could not; her defence would have been this, That no law in Scotland supported the pursuer's conclusion: And unless it shall be imagined that a penal law, peculiar to England, and contrary to the constitution of the law of Scotland, could have effect, and be put to execution in Scotland; the libel could not possibly be so much as sustained: And if a libel could not be sustained in Scotland on this claim, it seems to be destitute of all foundation, to imagine that the claim should grow better, because a judgment was recovered upon it in England. As this is an obvious objection against this decree in particular, so it tends to shew in the general, that foreign decrees ought not to be put to execution without looking into the merits of the cause: For besides the limitation allowed of by the pursuer, That they contain nothing contrary to the constitution and laws, the Judge ought likewise to examine that nothing is decerned contrary to the universal law of equity, which should reign over all. But, in the *second* place, There is this particular objection against the decrees of the Queen's Bench, That they keep no record of proof led before them; which makes a strong argument why such a decree should never be put in execution: For it cannot be controverted, but that if the Lords saw the evidence upon record, and saw the verdict unjust, they would refuse to interpose their authority: Can then the Lords give execution to any decree, where the form deprives them of an opportunity to judge whether the evidence was good for any thing or not? It is apprehended, in such a case, justice does require, that such decrees ought not to be regarded,



regarded, since the Lords are to judge with knowledge, not in utter darkness upon the word even of a jury. And what the defender truly at the bottom complains of is, That the verdict was in reality iniquous, supported by the single testimony of a maid, the pursuer's servant, who was pick'd for having been accused justly of robbing the defender; and that in contradiction to the testimony of another person perfectly unbiassed, who swore that the fire began in one Mrs Fincham's apartment, and not in the defender's. Now, if the judgment be turned into a libel, and the ground thereof yet to be instructed by evidence, the truth of this objection will clearly appear. In an argument of this kind, it cannot have escaped, what was found in the late case betwixt Sir John Swinton and Goddard: Goddard insisted on a decree of the King's Bench, in which Sir John Swinton, as cashier, was ordained to pay to Goddard, as partner, a considerable sum: That judgment was in a case of civil debt, in which the laws of all civilized nations are almost the same: The Lords sustained the judgment; but with a quality, that the pursuer should still prove that he was partner, and Sir John cashier: From this sentence, as not respectful enough to the King's Bench, the pursuer appealed to the House of Lords; but after hearing council on that point, the Lords affirmed the decree of the Court of Session.

Replied by the pursuer to the first part of the defence, What might be the case of a sentence upon a crime, there is no occasion to dispute, her action not being for the penalty of a statutory crime, or founded upon a penal custom; but arising plainly *ex tacito contractu*: For where, by the particular custom of a country, any man who hires a house, is liable to make up the damages happening in his house by fire, without burdening the setter to prove it was by his fault; which is the whole meaning of this custom. The conductor is supposed in law to paction with the setter in these terms: And the decree for damages that ensues, is not properly a decree upon a penal custom, but a decree actually upon a contract, which, upon the footing of the established law of the place, is supposed to have been entered into betwixt parties. Taking it in this view, there is nothing in the law contrary to equity; it is even at this day a question not agreed amongst lawyers, whether that very custom is not agreeable to the Roman law, and several of the first rank hold that it is. The question they state is this, Where fire happens in a house, upon whom lies the burden of proof? whether upon the inhabiter to prove his diligence, or upon the setter to prove the inhabiter's fault? And a whole tribe of lawyers agree that this burden lies upon the inhabiter, because of the presumption which the law has laid down, That *incendia plerumque sunt culpa inhabitantium*; such as *Fachineus Contrav. l. 1. c. 87. Mollerus Semest. l. 4. c. 31. Sande. l. 30. t. 6. def. 9. & Vinn. Select. Quest. lib. 1. c. 33.* Now, there being nothing contrary to equity in this claim; it follows, That an action upon it originally intended in Scotland must have been sustained, although no part of our law, yet as noway contradictory thereto; but falling to be determined by the law of the place where the fire happened: Upon the same principle, that the Lords determine upon bonds or contracts made abroad according to the law of the place. Here then the defender's first argument falls at once to the ground: And as to the

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second;



second; comity, if it has any effect at all, must infer a presumption that all things are fairly carried on, and that the decree is just and equitable, unless the contrary appear from the decree itself: This matter is fully handled above, and it is particularly taken notice of, what confusion it must occasion in the way of an appeal, if the Lords should refuse their authority to an English decree, because the proof is not recorded: As for Goddard's case taken notice of in the last place, it comes noway up to the present; for there the Lords were of opinion, that the same relief was competent to the party in England which they gave him here; which, if the defender could here pretend, she should have been admitted in the terms of the decision in the same way to plead that relief; but that there is no foundation for, the decree being in every point unexceptionable according to the English forms: For here the argument from the decision is directed against the evidence upon which the decreet proceeded, which having been by witnesses in a court which keeps no record; it is impossible that any relief could be had in that point, not even were the question before the Parliament; whereas, in Sir John's case the evidence was by writ; in which case the law of England would allow relief, were there any thing overlooked.

“ The Lords found, That execution ought to pass on this decree  
 “ of the Queen's Bench, unless something competent in law or  
 “ equity be objected against it.”

Against which a reclaiming petition was offered; but one of the parties dying in the interim, the cause was never further insisted in.

N<sup>o</sup> XXII.

January 1721.

MARY RAE *contra* JAMES BROWN.

*In Legatis tempus motæ litis spectandum, non mortis Testatoris.*

**T**HE deceased Helenor Rae assigned and disposed to James Brown certain bonds, and her whole other moveables, with the burden of L. 110 Sterling to Mary Rae in name of legacy. Several of the funds belonging to the defunct were subjects bearing annualrent; her debts did in part not bear annualrent: And entering the account at the death of the testatrix, the debts exceeded her effects; but by the growing of the annualrents after her decease, and the creditors not exacting their payment, it fell out that the subjects left by the defunct were increased above her debts: Upon which the question arose, In legacies, if *tempus mortis spectandum*, or *motæ litis*?

For the legatrix it was pled, That annualrents arising after the testatrix's death, ought to be counted in order to enlarge the fund of her payment; for the executor is still liable, unless he can say, that the inventar is exhausted the time of the dispute.

It was answered, That legacies being only payable out of the free gear; since there was no free gear at the death of the testatrix, there could no legacy be due; and so not being then a debt, it could not thereafter convalesce.

Replied,



Replied, Were legacies *ipso jure* diminished to the proportion of the free gear at the defunct's death, the answer would be good; but since the deficiency of a free fund for paying the legacies affords an *extrinsic* exception only, whenever the cause of the exception is removed, the exception falls of course.

"The Lords found, That the growing annualrents of the subject  
"in the disposition are to be brought *in computo*, in order to afford the pursuer her legacy."

N° XXIII.

14th February 1721.

Competition NICHOLAS JUNQUET LA PINE, taylor, with the CREDITORS of the Lord Semple.

*A bond granted in England bearing a registration in Scotland, if null because not in the Scots form?*

**I**N the sale of the estate of Semple, a question arose about a bond for L. 900 Scots, granted by the deceased Francis Lord Semple to Nicholas Junquet la Pine, taylor in London, dated at London, 10th November 1699, bearing a consent to registration in the books of the Court of Session in Scotland. And it was argued against the bond for the other creditors of Semple, That the bond being registrable in Scotland, framed in the Scots style, and for money of a Scots denomination, and consequently designed only to have execution in Scotland, it ought to be according to the Scots forms, as much as if made in the country: But so it is, that it wants the designation of the witnesses, which is a nullity by the Scots law. It is a rule indeed, That the forms of writs are to be judged by the laws of the place where they are made; because it being understood that execution is to pass there also, the parties are presumed to agree to be determined by the laws of the place: But from the same reason it will be inferred, where execution is expressly agreed to pass, in another country than that of the contract, that the laws of that country must take place from the tacit consent of the contractors, equally as there had been an express stipulation to that purpose. And to confirm, this pleading was adduced, 8th December 1664, Scot *contra* Henderson; where it was found, "That a bond made in England, but after the Scots form, and registrable in Scotland, was to be judged by the law of Scotland, and so not to be taken away by witnesses; and *l. 21. obl. & act. Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.*"

To which it was answered, It is very true, every contract and every deed must be judged by the laws and rules agreed to, expressly or tacitly by the contractors; so that as to the bond in dispute, though good by the English forms, if yet it was the will of the parties, that it should be after the Scots forms, otherwise to have no effect, unquestionably it must fall to the ground, as wanting some necessary solemnities of that law: But the argument fails, in that there is no evidence of such a consent; had it been the design in giving the bond, that Lord Semple should be bound in Scotland, and no where else,  
the



the evidence would be clear; but this will never be understood the intention of parties. The rational interpretation of such a transaction can be no other than this: His Lordship was owing to Mr Junquet la Pine the sum of L. 900 Scots, which being an *absolute* debt, without any qualifications, he was bound to pay it, *whenever* and *wherever* demanded; it was but equitable to give the creditor a writ in evidence of his debt, which should be as little limited in its effects as the obligation to which it related: This he did in the only way it was possible, by making out a bond in the form of the country where it was granted; which as it was *ex vi legis* directly effectual there, so *ex comitate* in every other civilized country: And because the debtor's estate lay in Scotland, and the creditor had greatest expectation of making his payment effectual there, therefore registration was agreed to pass in that country, in order for ready execution, which could not be any where else, but by way of action. If this be a fair view of the matter, no presumption will be inferred from the clause of registration, that the parties designed to regulate this writing by the laws of Scotland; on the contrary, as it was made after the English form, there is the strongest evidence likewise from the nature of the transaction, that it was understood as a valid English obligation; and as it might have been followed forth directly by way of action in that country, our judges *ex comitate* will give it the same effect here. As to the decision cited on the other side, if they should endeavour to take away this bond by witnesses, the decision will be a standing rule against them; from this principle, who so subjects himself to an obligation to be performed in a certain place, is *eo ipso* understood to subject himself to the laws of the place, with relation to that obligation; which is, in other words, *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit*. And it is indeed plain enough, the laws where the contract is entered into, and where performance is designed, being repugnant, since both cannot take place, that the laws where performance is designed, should prevail: But upon the first reflection, this will be found to have no relation to the case in hand; for though this bond cannot be liable to be taken away by witnesses, and not taken away at the same time, nothing in nature hinders it, as it truly was designed to be at the same time a binding obligation both in England and Scotland.

“ The Lords found, That this bond is null by the law of Scotland;  
 “ but that a bond granted in England, according to the laws and  
 “ forms there, is effectual to produce action in Scotland, albeit  
 “ by the tenor of the bond it does appear that the payment and  
 “ execution was intended to be in Scotland.”



N° XXIV.

18th February 1721.

Mr DAVID SPENCE *contra* Mr ALEXANDER ELPHINGSTON.

*If a Disposition, null for want of Power in the granter, as to the principal Sum, will yet carry the Annualrents over which he had Power, though not expressly conveyed; these being only accessory, and regularly falling with the Principal?*

THE late Archbishop of St Andrew's disposed a sum to Alexander Rofs, his eldest son, in liferent, and his heirs in fee; failing of which, to James his second son, and his heirs in fee: In which substitution, though James was designed to be fiar, yet by some clauses in the deed, his power was restricted, that he could do no deed in prejudice of his children. Afterwards, by a contract betwixt the brothers, James discharges the substitution in his favours, and agrees that his brother Alexander should have the disposal of his own portion; whereupon Alexander makes a disposition to Lady Balmerino, his sister, in liferent, and her son Mr Alexander Elphingston in fee: The Lord Balmerino being debtor in part of the sum disposed thus to Mr Alexander Elphingston, David Spence, a creditor of James Rofs's, arrests in his hands, and (Alexander Rofs being now dead) pursues a forthcoming of the annualrents that fell due since his death; founding his claim in this manner, That since Alexander Rofs's disposition to his sister and nephew was null as to the principal sum, (which it was allowed to be, because Alexander could not dispoise upon the fee, except in consequence of his brother James's discharge, and James could not discharge in prejudice of the substitution) it must also be null as to the annualrents, which could only be carried as a consequence of the principal; and therefore concluding, that James and his creditors should be found to have access to the annualrents, as if the discharge had never been granted. On the other hand, it was contended for Alexander Elphingston the dispoinee, That though the disposition be not found effectual for the principal sum, as flowing *à non habente potestatem*, it must be good as to the annualrents; which without question James Rofs had the absolute disposal of after his brother's death, by virtue of the substitution, and which he has *virtually* disposed in the contract and discharge above mentioned: So that now he cannot be heard against his own deed.

The question came shortly to this, "How far this discharge of the substitution, which as to the principal matter intended by it, was ineffectual, was nevertheless sufficient to convey to Alexander a power of disposing the annualrents which should grow during the lifetime of James, though no mention was made of these annualrents, or of any power of disposal thereof." And it was pled for the arrester, That James Rofs has neither *expressly* or *virtually* assigned or discharged these annualrents: For as to the discharge of the substitution *in totum*, which is admitted he could not do; since it is a void deed as to what was thereby *directly* intended, must be ineffectual as to the conveyance of the annualrents; which only would be



carried as a *consequence* thereof, were it entirely valid. James indeed had the disposal of these annualrents during his lifetime; this power he might have exerted, by granting direct assignations to the annualrents, as a *principal* subject: But, *quod potuit non fecit*; he chose to make a deed, which if valid, would in consequence have carried the annualrents as an *accessory*: But since this deed is null, it can have no *consequences* or *accessories*. In a word, Mr Elphinston can have no claim to these annualrents as an *accessory*; because if the *principal* deed be null, so must its *accessories*: He can have no claim to them as a *principal* distinct right, because there was no such conveyance made to him; and therefore he can have no right to them at all. To clear this point from analogy, Mr Spence shall produce a few instances where this ground of law takes place. A person interdicted may assign the rents of his lands without consent of his interdictors; a disposition of these lands made by him would imply a right to the rents; and yet if this disposition were reduced *ex capite interdictionis*, it is certain law it would not subsist to carry the rents. An heir of entail, under prohibitory and irritant clauses, may assign the rents of his lands *cum effectu*, during his life; a disposition made by him, would virtually contain an assignation to the rents; and yet if that disposition were reduced, as flowing *à non habente potestatem*, it would not maintain the disponent in possession of the rents. Again, an heir of entail, empowered to set long leases, but not to alien, by disposing, gives the purchaser power virtually, to set what tacks he pleases; a tack set by such heir would be valid, and yet tacks set by the purchaser, in virtue of the right received from him, would be good for nothing.

On the other hand, it was contended for Mr Alexander Elphinston, "That wherever any person disposes a subject, though his disposition may not be valid to the full effect intended, through defect of the disposer's right, it will carry whatever interest he has in the subject;" which Lord Stair expressly holds forth, *Tit. Dispositions, pr.* and gives the reason at the same time with the authority. But to come close to the argument, it is allowed, that Mr Elphinston's right to the annualrents, is neither as an *accessory*, nor by virtue of a direct assignation of that subject, as a *principal* right; yet it will not follow, that he has no right. There is a *third* branch, upon which Mr Elphinston founds; and the way he lays his claim, is precisely thus: Though the discharge in the mutual contract, of the substitution, was null, and consequently could not carry the annualrents as an *accessory*, it nevertheless implied a valid obligation upon the granter of this discharge, to make these annualrents effectual to Alexander Ross; and of consequence to Mr Elphinston his disponent: But it is an uncontroverted principle, that an obligation to grant a disposition, is virtually a disposition; and therefore, though Mr Elphinston has no direct positive disposition to the annualrents, he has what the law reckons equivalent thereto. To answer the examples produced on the other side: As to the *first*, A person interdicted cannot dispose the rents of his lands without his interdictors; he may indeed discharge bygone rents, or assign them from term to term; for then they are considered as a moveable subject, which interdic-

tions



tions do not touch; and accordingly these will remain with the disponent, though the disposition be voided *ex capite interdictionis*: As would also the whole rents, during the life of the interdicted person, if it were not that a disposition to rents in time to come, is an heritable subject, falling under interdiction; so that this example turns strongly against its maker. As to the other examples, they do not apply to the present case: It is indeed true, that a disposition by one under prohibitory and irritant clauses, will neither convey the lands or the rents; but the reason is, because the disposition irritates the disponent's own right; and consequently any pretence of right in the disponent. But suppose one to be possessed of an estate, not under irritancies, but under an obligation not to alter a certain order of succession, notwithstanding whereof, he gratuitously disposes to a third party; if the next heir of the investiture raise a reduction, he will not prevail further than he is lesed; but *ita est*, he suffers no prejudice by the disposition, during the disponent's life, which therefore for the rents during his life, would subsist to the acquirer: And it would be absurd to pretend, that the heir prevailing in his reduction, the rents would fall back to the disponent; and yet this is precisely the case in hand.

“ The Lords found, That supposing the father's destination did  
 “ disable his sons to discharge the mutual substitutions, as to  
 “ the fee of the sums disposed to them by the father; yet found  
 “ the conveyance made by Alexander to Lady Balmerino and  
 “ Mr Elphinstone, by virtue of the mutual contract, is effectual  
 “ for the annualrents of these sums bygone, and in time coming,  
 “ during James's lifetime.”

N<sup>o</sup> XXV.

February 1721.

PATRICK Viscount of Garnock *contra* the Duke of QUEENSBERRY.*A Bill not in the ordinary Form, found null.*

**J**AMES Duke of Queensberry, deceased, did, in June 1708, draw a bill on David Earl of Glasgow, of the following tenor:

“ My LORD,

“ Be pleased to advance to John Viscount of Garnock, upon the  
 “ account, and for the use of Patrick Master of Garnock, his eldest  
 “ son, ten shillings *per diem*, commencing from the first of June in-  
 “ stant; and that ay and while the said Patrick Master of Garnock,  
 “ be provided with a company in her Majesty's forces. This from,  
 “ my Lord, your humble servant, QUEENSBERRY.”

On this title, the said Patrick Viscount of Garnock pursues his Grace the Duke of Queensberry, as representing the late Duke his father, for the sum of 10s. *per diem*, since the first of June 1708, and in time coming, until he be provided with a company in the forces; and for damages for non-performance.

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The defence was, That this is no proper bill, and therefore must fall, as wanting writer's name and witnesses. And it was contended, that it is not every writing that hath a drawer, a person on whom it is drawn, and a creditor, that can be reckoned to have the privileges of a bill; which will be plain, by reflecting, that the only reason why these privileges are indulged to bills, proceeds from this, that they are looked upon as bags of money, passing from hand to hand, as a necessary *medium* of trade. If then it appear from the deed, that it neither is or can be looked upon in this manner, it is not in the power of private parties to give it those privileges; so that indeed a proper subject, namely, a sum of money to be paid at a certain time, is as essentially necessary to the nature of a bill, as a drawer, acceptor or creditor. Now by this writ, there never was any design to transfer money from hand to hand; this could be no view in the transaction, but barely to grant a security: Besides, it is entirely gratuitous, without an onerous cause in money or merchandise, which of itself is enough to defeat it, it being inconsistent with the nature of a bill to be gratuitous; and therefore, if this writing be allowed to pass as a bill, then marriage-covenants, jointures to wives, alimments; in short, every thing that can fall under an obligation, may be established by the form of a bill, which would confound all securities, and render ineffectual all our excellent regulations, that are designed to secure us against forgeries. It is true indeed, that from the favour of commerce, right to merchandise may be conveyed without all the solemnities of law; but then, though conceived by way of bill or precept, they have not the privileges contained in the said acts of Parliament, as was decided 16th December 1713, *Lesly contra Robertson*, 19th February 1715, *Douglas contra Erikine*: But however the ordinary solemnities be dispensed with, on this account altogether, that the matter is *in re mercatoria*, though not precisely for money: When precepts concern the delivery of salt, meal or other merchandise, to extend that to obligations, for daily or yearly prestations, during one's life, or to an uncertain event, would be to overturn the foundations of our law anent bills. Neither is this case similar to that of a bill drawn for a certain sum of money, payable in different parcels; which indeed is a proper subject in commerce, and only so many bills in one paper, as there are terms of payment; whereas here, the precept being for a daily prestation, can no more be a *medium* of trade, than a life-right, or indeed any other *security* whatsoever, that can be figured in imagination; and therefore this improbate deed can never stand against the force of the good and laudable laws, made to prevent the ruin of families, by guarding against the artifices of forgers.

“ The Lords refused to sustain this bill.”



N<sup>o</sup> XXVI.

6th July 1721.

Mr PATRICK GRANT of Elchies, Advocate, *contra* Mr PATRICK STRACHAN, Writer in Edinburgh.

**W**ILLIAM ERSKINE, collector of the customs at Stranrawer, and Mr Patrick Grant, gave bond to Sir Edward Eizat for 1000 merks, binding themselves conjunctly and severally to pay the same; and the day thereafter, the said William Erskine, and Mr Strachan grant a bond to Mr Grant, narrating the former bond, and subsuming, "That seeing the said sum was wholly applied for the use of Mr Erskine, therefore they, the said William Erskine and Mr Patrick Strachan, bound and obliged them, their heirs and successors, not only to free, relieve, harmless and skaithless keep the said Mr Patrick Grant, from all payment of the foresaid sum, but to retire the bond or a sufficient discharge." And there is a clause subjoined, whereby the said William Erskine obliges him, to free and relieve the said Mr Patrick Strachan, by being bound with him in manner above mentioned. Mr Patrick Grant having paid the sum contained in the bond, charged Mr Strachan as liable to him in relief; which was suspended upon this head, That Mr Strachan was not bound *conjunctly and severally* in his bond with William Erskine; and consequently that he was only liable *pro rata*. To which it was answered, That Mr Strachan, by the conception of the bond, was cautioner for William Erskine; and as such, must be liable for the whole debt.

Accordingly it was pled for the charger, it will be sufficient if he shew, that the suspender is by the import and conception of the bond, bound as cautioner for Mr Erskine, though the word *cautioner* be not expressly mentioned, which is sufficiently plain; for the bond proceeds upon a narrative, "That the money was solely applied to the use of Mr Erskine;" which is, in other words, that Mr Erskine was principal debtor in the charger's relief; and then proceeds "to bind him and the suspender to relieve the charger;" that is, to bind the suspender to perform the deed, for which Mr Erskine was principally bound; which is as clear an obligation upon him *qua* cautioner, as words could make it, without using the word *cautioner* itself, which cannot be absolutely necessary. Should the bond be otherwise understood, this consequence must follow, that Mr Erskine himself as principal, would only be bound for the one half of the money, which he acknowledges came wholly to his own use; for if the one be not cautioner, the other cannot be principal, the one term always implying the other. Now, as it would be a plain absurdity for Mr Erskine here to plead, that he were not principally bound, it seems no less so for the suspender to plead, that he is not cautioner.

Answered for the suspender, it is acknowledged that he is in effect cautioner, for so the clause of relief without further imports; but then the question returns, How far this obligation of cautionry does extend? For though it is a common rule in law, that *obligatio fidejussoria* cannot be larger than that of the principal, nothing hinders a



cautioner to be bound in less. Now Mr Strachan conceives this to be the present case, in regard he is bound with William Erskine to relieve Mr Grant, but not conjunctly and severally; and therefore it was understood at granting thereof, that it was only *pro rata*. If indeed the form of the obligation had run in this manner, That the said William Erskine as *principal*, and the said Mr Strachan as *cautioner*, had bound themselves to relieve, &c. then indeed both would have been liable *in solidum*, though the words *conjunctly and severally* had not been found, because there had been two different kinds of obligations, one principal and another accessory: But the case alters, when another form of contracting is chosen, namely, that both of them bind as *principals*, but not conjunctly and severally; there the rule of law must take place, that the co-obligant is only bound *pro rata*; now here there are not two distinct obligations, one principal, another accessory; the two co-obligants are bound together in the same individual obligation, "Therefore I the said William Erskine, and Mr Patrick Strachan, bind and oblige us," &c. nay in the same clause, and in one breath, one not before or after the other: And it is nothing to the purpose, that, in the truth of the matter, the money was applied wholly to one of them, because it is not the receipt of money, but the form of the words, by which we are to judge of the obligation; besides, that the receipt of the money, though it makes an alteration in the circumstances of the co-obligants, as to one another, makes none at all as to the creditor: And thus in the present case, Mr Strachan is in effect as cautioner, with relation to William Erskine his co-obligant, both because the money was applied to William Erskine's use, and because of the clause of relief; but from the conception of the obligatory clause, it appears without doubt, that with relation to the creditor, he stands as a co-principal, jointly with William Erskine, and consequently liable only *pro rata*; and it admits of as little doubt, that the same defence would even be competent to William Erskine, though he got the money; and upon a second reflection, the charger will not find this at all absurd.

There was a separate argument insisted on for the charger, That whether the suspender be a cautioner or not, he is still liable *in solidum*, in regard he is bound *ad factum præstandum*, viz. the retiring the bond, or a sufficient discharge thereof, which obligation does not admit of a division into parts; for one cannot retire half of a bond.

Answered for the suspender, seeing the fact to be performed is the retiring of the bond, which in other words is nothing else, but paying the debt; it can make no alteration, because it is not *factum individuum*, consisting only *in faciendo*: And undoubtedly in all reliefs whatever, the retiring of the obligation, for which the relief is granted is ever implied: So that in truth the obligation here is to pay, and the performance could only be made by payment; and the clause obliging to retire the bond, is a clause of style, and makes no manner of alteration.

Replied, That this is not barely a clause of style, but has its effect; and it appears certain from it, though William Erskine and Mr Strachan had actually paid the money to Dr Eizat, they still failed in performance of this obligation to Mr Grant, till they delivered him the retired bond itself, or a discharge; and there was good reason for the



the clause, because till one or other of these was performed, Mr Grant lay still open to a pursuit.

“ The Lords found the suspender liable to relieve the charger in  
“ *solidum.*”

N<sup>o</sup> XXVII.

July 1721.

Sir JAMES FOWLIS of Colington, *contra* his Sisters.

*Bonds of provision upon death-bed not sustained.*

THE now deceased Sir James Fowlis of Colington, upon death-bed, granted to each of his two daughters, Elizabeth and Mary, bonds for the sum of 4000 merks, as their provision and portion natural; of which bond the now Sir James Fowlis of Colington, son to the defunct, intended reduction upon the head of death-bed: And it was pled for him, That the law of death-bed extends to all deeds whereby the heritage can be evicted, 7th January 1624, Schaw *contra* Gray; and 1st July 1637, Riddel *contra* Richardson; where the Lords “ repelled the allegiance, and sustained the reason of death-bed: “ For they found that the father could make no provision on death-bed in favours of his bairns, albeit unprovided, which might burden the heir with payment thereof; and that he could do nothing, “ but in so far as he might do in his own part, in law belonging to “ him, in so far as concerned his moveables:” Which is a decision directly in the case.

The defenders answered, That the provision of children being *debitum naturæ*, bonds of provision granted in satisfaction of that debt, ought to be sustained, in so far as they are suitable to the condition of the children, and of the father's estate. The rule is, Wherever there is a preceding debt, a party on death-bed may grant a bond, or anailzie land: And the law has made no distinction, whether the debt had its arise from any antecedent, civil, or natural cause; both being equally binding upon the heir, who, by our law, would be obliged to aliment the younger children, as well as to pay debts contracted by bond or otherwise to extraneous persons in *liege poustie*: And here the father, by granting the bond of provision, has in effect done no more but regulated the fund of the aliment; which, when exorbitant, is subject to rectification of the Judge, but if moderate, with respect to the circumstances of the estate and rank of the family, there can be no reason for the heir to reclaim, or allege that such provisions were to his prejudice. And this is Lord Stair's opinion, l. 3. t. 4. § 29. and a similar case to this was determined 23d February 1665, Jack *contra* Pollock. As to the decision, Riddel *contra* Richardson, it is answered, That the course of our law at that time was to allow no aliment to younger children, however necessitous, from the heir: Which is otherwise now; according to the citation from Lord Stair, mentioned before. “ And now,” says that author, “ since the Lords have frequently decerned aliment for bairns “ against the father's heirs, having competent estates; it is like the  
“ Lords



“ Lords will allow all provisions on death-bed, in so far as they may be competent aliments.”

Replied for the pursuer, A father is bound to aliment his children till their majority, that they are capable to provide for themselves; deeds on death-bed will be sustained so far as that obligation of aliment reaches; and this is all Lord Stair says: But here the bonds craved to be reduced are not alimentary bonds; they are bonds which the father was not under an antecedent obligation to grant, and therefore cannot stand against the force of a reduction upon the head of death-bed.

“ The Lords found the bonds reducible upon the head of death-bed.”

N<sup>o</sup> XXVIII.

December 1721.

Sir JAMES KINLOCH of that Ilk, *contra* BLAIR of Ardblair, Merchant in Edinburgh.

*An executor is but a trustee, and cannot gratuitously discharge debts owing to the defunct.*

**S**IR James being creditor by progress to the deceased Mr Gilbert Blair of Balgersho, obtained from his executor an assignation to certain debts due to the defunct, and given up in the inventory of his confirmed testament; and amongst others, a bond of 300 merks due to the said Mr Gilbert by the said James Blair: Upon this assignation, James Blair being charged, he obtained suspension upon a gratuitous discharge granted by the said Mr Gilbert Blair's executor, of a date anterior to the assignation.

The question arose, If a gratuitous discharge by an executor, to the debtor of the defunct, does exclude the defunct's true and lawful creditors? And it was contended for the pursuer, that it does not; because, *1mo*, The defunct himself could not have gratuitously disposed or discharged in prejudice of his creditors; far less his executor who is now bankrupt. *2do*, An executor is only trustee for the creditors of the defunct, and has by no means the absolute disposal of the subjects confirmed.

To the *first*, answered, The executor was solvent at the time of granting the discharge; and it is a rule, That gratuitous deeds are only reducible upon the act 1621, where the granter does thereby become insolvent: So that as the defunct himself could have granted this discharge notwithstanding his former debts, so may his executor; and if the executor became thereafter insolvent, *sibi imputet*, who did not insist in time against the executor to obtain payment.

To the *second*, answered, The executor is not in any proper sense a trustee, but a *successor*: He is indeed accountable to the creditors as far as to the value of the testament, but they have no *real* interest in the defunct's goods; otherwise they might recover them *rei vindicatione*, or *condictione*, against his debtors; which will not be pretended: All they have, is a personal action against the executor to account *secundum vires inventarii*: So that though the executor do gift or dilapidate



date the inventory, the acquirers are secure, providing he becomes not thereby bankrupt; and the only redress of the creditors is by their personal action against the executor.

Replied to this *last*, An executor is truly a *trustee*, which the very name denotes, importing an *office*, not a *succession*; he indeed has the only power to intromit with the defunct's moveables, and pursue *rei vindicatione*, or *condictione* against his debtors; but is not this perfectly consistent with his being a trustee? is it not the very design of the thing, that he alone should intromit for the common benefit of all concerned?

“ The Lords refused to sustain the gratuitous discharge.”

N<sup>o</sup> XXIX.

December 1721.

MARION SELKRIG *contra* JOHN SELKRIG her son, and the CREDITORS of her defunct husband.

*Mutual Obligements.*

**W**ILLIAM SELKRIG, in his contract of marriage with Marion Selkrig, obliges himself in contemplation of the future marriage, to provide the sum of 20,000 merks, and take the security thereof to himself and his future spouse in liferent, and the children of the marriage in fee: On the other part, Marion Selkrig, in name of tocher-good, assigns and disposes to her future husband, a bond of provision, together with some houses in Glasgow, absolutely and irredeemably; and the disposition in the contract of marriage contains procuratory of resignation and precept of seisin, but which was never execute, nor infeftment taken by the husband. The husband afterwards dying insolvent, and never having implemented his part of the contract, Marion Selkrig, the relict, insisted in a declarator against John Selkrig her son, and her husband's creditors, “ That her disposition contained in the contract of marriage cannot be effectual to her husband's heir or creditors, unless the mutual cause, *viz.* her liferent provision be made good to her.”

It was objected by the creditors and heir, Were they insisting against the relict for performance, the defence would be good, that she was not bound, unless the prestations on the other side were also performed; for such is the condition of mutual obligations: But the creditors have no claim against the relict, she has already made an ample conveyance to her husband by procuratories and precepts; and having taken herself to her personal action against her husband, she stands upon the same footing with any other of his onerous creditors, and can plead preference only, if she is *prior* in diligence.

Answered for the pursuer, The transaction stands still upon the footing of mutual obligations; the subject of the disposition is still in her person, she remains proprietor; her husband never having done any thing upon his disposition, to complete the conveyance; and as he never was invested, she never was divested: All therefore the pursuer craves, is to retain her own subject till she be secured in her liferent, which was the mutual cause.

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“ The Lords found, That the disposition cannot be effectual to the  
 “ heir or creditors, unless the pursuer’s liferent be made good  
 “ to her.”

The like was found betwixt Martin and Lothian, July 1724, where a wife having assigned to her husband in the contract of marriage, the sum of 4000 merks in name of tocher. The Lords, “ in regard the prestations on the husband’s part, were the *mutual cause* of the  
 “ pursuer’s assigning to him her portion, and that the husband, by reason of his insolvency,  
 “ was incapable to fulfil these prestations; therefore found and declared, that the wife had  
 “ a preference to all her husband’s creditors, in so far as concerned such part of her portion as remained unuplifted, for her security.”

N° XXX.

17th January 1722.

STEEDMAN, feuar of the mill of Kinross, *contra* HORN and YOUNG.

*Thirlage.*

**T**HE lands of Kinross were feued out by the proprietor to the country-people, for a small silver-rent, with a dry multure of *omnia grana crescentia*, to his mill of Kinross. Afterwards a burgh of barony and regality was erected, and then the proprietor thirled the inhabitants, who are likewise feuars within that burgh, for so much of their corns that should be imported, as tholed fire and water within the burgh; and both these thirlages of *omnia grana crescentia*, *et invecta et illata*, were established by the vassals charters. In the prosecution of these several thirlages, a question arose, “ Whether the corns  
 “ of the barony, after having paid a dry multure of *omnia grana cres-*  
 “ *centia*, being carried afterwards into the burgh, were liable again  
 “ for the other duty of *invecta et illata*.”

It was urged for Steedman, feuar of the mill, That in constituting these two distinct servitudes, the proprietor proposed to himself a distinct duty and rent out of each; he considered what quantity of grain might grow in the barony, and what might be consumed in the town; and he laid a tax upon each of them separately, without relation to the other; and this is most of what he draws instead of rent: Why then should not the same grain be liable to both these duties, if it is a true proposition, that it grew within the one feu, and tholed fire and water within the other? It can make no difference, that the same over-lord is superior of the barony and of the town; and that it favours of a hardship, that he should exact two several multures for the same grain, since such is the express constitution of these different thirls. Put the case, the Baron of Kinross were possessed of another barony in the neighbourhood, thirled to its own mill, it cannot be controverted, but that the grains of this other barony, which had paid multure at its proper mill, would be liable to the duty of *invecta et illata*, upon being imported into the town of Kinross, and yet the same imaginary inconveniency or impropriety should occur in that case, as in this, that the same grain had paid a double duty. And thus it was determined in the noted case, Ramsay *contra* Town of Kirkcaldy, 11th December 1678.

On the other side it was urged, That the rational interpretation of these servitudes, in consistence with one another, and with cool sense, can



can be nothing but this; the proprietor designed not only the corns growing within his barony, but all beside brought into his town for the use of the inhabitants, should be manufactured at his mill; or which to him was the same, that they should pay a certain duty, with liberty of being manufactured there, or any where else. Even from this general view it will be evident, that the same corns can never be subject to both thirle-duties; for the duty being the price of the manufacture, since the same corns cannot be twice manufactured at a mill, they cannot be liable to two thirle-duties; for this were to pay the price twice for the same purchase. These then *invecta et illata*, and *omnia grana crescentia*, are not two distinct servitudes, as the pursuer erroneously conceives them, but the same, extending indeed over different subjects, *sciz.* not only the corns growing in the barony, but any other corns brought into the burgh; and so the *grana crescentia*, whenever that servitude is satisfied, by paying a dry mulcture, they have thereby as it were purchased their freedom, and cannot be subject to the same servitude over again. The impropriety therefore of the pursuer's claim, does not lie simply in demanding double duty for the same grain, but in demanding twice the same duty, upon the same *medium*, both of them upon the precise same *cause* and *account*, which is not only improper, but truly inconsistent.

“ The Lords found the grain growing within the barony of Kinross, cannot be liable for thirle to the mill of the barony, both  
 “ as *grana crescentia*, and *invecta et illata*.”

N° XXXI.

2d February 1722.

FERGUSSON of Auchinblain *contra* Mr WILLIAM MAITLAND.

*The Oath of the Debtor in a Forthcoming, if it is good against the Creditor, pursuing for the same debt as Assignee?*

**F**ERGUSSON of Auchinblain being creditor to John Colvin, did arrest in the hands of Mr William Maitland, Colvin's debtor; and in the forthcoming, having referred to Mr Maitland's oath, if he was debtor to Colvin the time of the arrestment; he deponed *negativè*, specifying, that he had been owing by a bond and backbond, but that these debts were satisfied and paid, though not retired. Some time after, Auchinblain procures from Colvin assignation to the said bond and backbond, in security and payment of his debt: Upon which having charged Maitland; in the suspension of the charge, Maitland having objected his oath, the question arose, if he could now be liable to the arrester upon these writs, as instructions of debt, having already deponed *negativè, deferente adversario*.

It was urged for the pursuer, That as an oath emitted by a debtor in a forthcoming, cannot hurt the common debtor, neither the common debtor's assignees; and as it had been competent for any other assignee to insist against Maitland upon the bond and backbond, it is equally competent to Auchinblain, who insists not here as arrester, but as assignee; for whatever might be alleged against him as arrester, it seems evident, that the oath can militate nothing against him as assignee.



assignee. Nor can it make any difference, that the same person is both assignee and arrester, because the assignation was a superadded title in the arrester's person, after the oath was emitted; and all effects thence arising, equally competent to the arrester, as to the cedent, or any other assignee.

It was answered, That the superadded title is of no effect, nor does it any way alter the case; for it is really nothing else but the same person choosing a different way of proof, which the law does not allow, especially when there is a transaction upon an oath. That Auchinblain is here to be looked upon as *eadem persona* in law, though vested with a different right, appears from this, that had Mr Maitland been absolved from the pursuer's claim, as arrester, by a decret in his favours, the exception of *res judicata* would protect him, from the pursuer claiming as assignee, *lib. 5. except. R. jud.* "De eadem re agere videtur, et qui non eadem actione agat, quâ ab initio agebat; sed etiam si alia experiatur de eadem tamen re: Ut puta si quis mandati acturus, cum ei adversarius iudicio sistendi causâ promississet, propter eandem rem agat negotiorum gestorum, vel condicat; de eadem re agit. Rectèque ita definietur, eum demum de re non agere, qui prorsus rem ipsam non persequitur; cæterum cum quis actionem mutat et experiatur, dummodo de eadem re experiatur, etsi diverso genere actionis quam instituit, videtur de ea re agere." Had the assignation indeed been purchased any other way, than in security or payment of the debt, which was the foundation of the arrestment, perhaps the case might receive a different determination; for it would be hard to say, that an oath emitted *deferente adversario*, can conclude that adversary further than his interest reaches; for thus far it might be reasonably urged, could the transaction be understood only to extend, by deferring the oath, since that was only in dispute: But then so far as the pursuer's present interest goes, an oath deferred is certainly conclusive; which, in this case, was the arrester's claim against the common debtor. Now here the assignation was in security and payment, which made it *eadem res*, the *same interest* with that in the process of forthcoming; the conclusion was the same, the *medium concludendi* only different: And therefore the oath must meet Auchinblain pursuing as assignee, equally as he were still insisting in his forthcoming.

"The Lords found the oath met Auchinblain pursuing as assignee."

N° XXXII.

February 1722.

ROBERT MAXWELL *contra* NEILSON of Barncailly.

*Law of Death-bed.*

**T**HE deceased Robert Neilson of Barncailly, in his contract of marriage with Elisabeth Stewart, having provided the conquest to the heirs of the marriage, granted a legacy upon death-bed of 500 merks to Robert Maxwell.

Death-



Death-bed being objected, it was answered for the legatar, The law of death-bed extends not to moveable subjects, which any proprietor may freely dispose of upon death-bed, unless in so far as he is restricted by the wife and children; the law has thought it proper only, to tie up people absolutely as to their heritable subjects, that they cannot alienate these upon death-bed, leaving moveables more free, as generally of less consequence: And the law of death-bed does not consider the heir *simply*, if he be prejudged, but if he be prejudged in an heritable subject; and therefore the moveables will be liable for this legacy; equally as if they were not provided to the heirs of the marriage; or being provided to the heirs of the marriage, as if the legacy had been granted in *liege poustie*, by way of disposition *inter vivos*. And thus it was determined, Mitchell *contra* Children of Littlejohn, 16th June 1676.

Replied for Barncailly, heir of the marriage, That the law of death-bed takes place against every *deed* done upon death-bed, to the prejudice of the *heir*; and that indifferently, whoever be the heir, whether of line, tailzie or provision; and whatever be the deed, whether an alienation of subjects in themselves, heritable or moveable.

“ The Lords found, That the clause of conquest in the contract of marriage, did hinder the father to dispose on his moveable estate upon death-bed.”

N° XXXIII.

13th July 1722.

Competition Sir JOHN KENNEDY of Culzean, with Mr HUGH ARBUTHNOT of London, Mariner.

1. Blank Writ upon the Act 1696.
2. A Writ importing a Substitution.
3. Exception of Death-bed competent to remoter Heirs, though not in prejudice of the immediate Heir-apparent.

**T**HE deceased Hugh Kennedy of Balterfan, whilst on death-bed, made a disposition of his estate to his only son John, and the heirs of his body; which failing to *blank*: And the disposition appears to have been signed with a *blank*, as to the substitutes: Subjoined to the subscription of parties, there is a doquet, empowering Fergusson of Auchinblain to fill up the *blank* in the disposition, with the names of John Kennedy younger of Culzean, and his heirs, &c. And the said *blank* appears now to be filled up accordingly. The words of the doquet are, “ I Hugh Kennedy of Balterfan, do hereby declare, that I give power and warrant to William Fergusson of Auchinblain, to insert the names of John Kennedy younger of Culzean, and his heirs, and failing him, to Sir Archibald Kennedy of Culzean, and his heirs, in the above disposition; I have subscribed this presents at Balterfan, 17th February 1701, before these witnesses, Mr Alexander Fairweather, minister at Maybole, and the said William Fergusson, writer hereof.” John Kennedy, only son to the said Hugh Kennedy, maker of the disposition, dying with issue, Hugh Arbuthnot of London, took out briefs to serve himself heir

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of line to Hugh Kennedy, who died last vest and seised; the service being before the macers, the Lords named assessors, and Sir John Kennedy having insisted that the lands of Balterfan should be struck out of the claim, both parties agreed to dispute their rights. And,

It was objected for Hugh Arbuthnot against the disposition, That the same was void as to the substitution in Sir John's favours, because the deed is after the act anent blank writs, and was blank as to the substitution at signing; so that whatever may be said of the other parts of the disposition, what clauses were *blank* at the signing are utterly void.

It was answered, That since this act 1696 does declare, "That all writs otherwise subscribed and delivered blank, than is by that act directed, shall be null," it can never concern a blank substitution in a deed of this kind, because the filling up the substitute contrary to the act, can never in sense annul the writ as to the institute; but since the certification is, "that the writ shall be null, *not* that the filling up of the blank shall be null," the law must certainly and only concern these writs, where the subsistence of the writ depends upon the filling up of the blank; for instance, where the creditor's name in a bond is blank, or the first institute in a disposition: But since the writ cannot be void, where the institute is filled up, although the substitution be blank; this is *casus omissus* in the law: The filling up of that substitution is left upon the footing of the former law; and therefore cannot be quarrelled upon pretence of this act. *2do*, This act can have no relation to a blank filled up by an order in writing of the granter himself, where the name of the person to be filled up is expressly mentioned in the written order, and that order signed before witnesses in the most solemn manner: Here there could be no fraud, nor occasion to give pleas, to prevent which the act was introduced, more than if the blank had been filled up before signing the original deed.

"The Lords found the disposition was not filled up in the terms of the act 1696, anent blank bonds, &c. and therefore must still be looked on as blank in the substitution."

It was pled in the *next* place for Sir John Kennedy, Though the Lords have found the disposition no better than blank as to the substitution, after which he has no access to serve heir of tailzie to Hugh Kennedy, the maker: The doquet is still a legal declaration of the said Hugh Kennedy's intentions that he should be substitute, and must have at least the force of a *fideicommiss*. so as to oblige the heirs at law to make the substitution in Sir John's favours, by granting a direct conveyance.

To which it was answered, It is not every declaration of intention that constitutes a right or transmission, else there would be soon an end of our settled forms and solemnities. In constituting rights and conveyances, the regular, legal, dispositive, or obligatory words must be used, before a person can be deemed to convey or bind himself; and therefore, though one's intention do appear, if it is not expressed in proper words, to convey or oblige, it has no legal effects; and it would doubtless be of very dangerous consequence, to give any colour to the alteration of the style, by which heritage is ordinarily conveyed.



conveyed. For this reason it is, that heritage cannot be conveyed in a testament, though made in *liege poustie*: And the Lords in such a case would not even find, that the testament imported an obligation upon the heir at law to denude: Nor would a substitution be sustained, if made in a testament, because a substitution is still a disposition of the heritage to the substitute. Upon the same account, a missive letter of a defunct, declaring his intention to dispoise his estate to a third party, in prejudice of his heir, would neither be good as a disposition, nor import an obligation upon the legal heir to denude.

Replied, As to the great danger of allowing the style of conveyances to be altered, Sir John Kennedy knows no danger at all in it; besides, he is insisting upon nothing that is contrary to the formal style of conveyances; for when the heir at law comes to implement the will of the defunct, he will be obliged to implement it by a very formal conveyance: But the law hath not tied down proprietors to a precise form, especially in naming of substitutes; any thing in the world does it, that expresses the will of the granter. And indeed it is no absurdity, that a man should name a substitute by a missive letter, if the date be supported, the writer expressed, and such formalities adhibit, as will hinder it to be a null deed. It is true, it has been introduced by custom, that no deed concerning heritage can be contained in a testament, for which perhaps no good reason can be assigned; but the law hath not prohibited heritage to be disposed of by any other deed; so that there is no arguing in this case from a testament, to any other form of writing.

“ The Lords found, That the doquet imports a substitution in favours of the persons therein named.”

The doquet being sustained as a good nomination of the substitute, it was objected against it by Mr Arbuthnot, that it was made on death-bed, and so not good against him the heir.

It was answered for Sir John, That this deed, though done on death-bed, is not reducible, because it was not to the prejudice of him who was apparent heir at the time, he being the institute, and the heirs of his body first in the substitution; and that it was unheard of, that a remoter heir, who came only to be heir at the end of many years, could quarrel a deed as done *in lecto* in his prejudice, if it was not to the prejudice of him who was apparent heir at the time. It is very true, that if a deed be done in prejudice of the immediate apparent heir, and that immediate apparent heir die, without ratifying or homologating the deed, the next in succession can quarrel that deed, *ex capite lecti*, not as heir to the granter, but as heir to the apparent heir who is lesed; and not upon that ground, that the deed was done to the prejudice of him the remoter heir, but because it was *ab initio* in prejudice of the immediate heir. This seems to be an undoubted point of law, plainly established by practice; for since the immediate apparent heir, by consenting to the deed, or homologating, can validate any deed on death-bed, so as to exclude every after-heir, yea though the immediate apparent heir should never enter heir; it is a plain proof, that the deed must be in prejudice of the immediate heir at the time, otherwise not reducible, because he can only consent



sent for his own interest. And in this way falls to be explained the decision, 16th July 1672, *Gray contra Gray*.

Replied for Mr Arbuthnot, He must take the liberty to contest the principle, "That the law of death-bed favours only the immediate" and not the remoter heirs," since the rule, as it is established by our law and practice, regards heirs without distinction; and the reason of the law seems to concern the remote, as well as the immediate heir. The intention of this constitution, was, doubtless, to prevent the importunities of designing people, who might take advantage of the weakness, or want of judgment of persons in sickness, to persuade them to defraud their heirs; and in proportion, as a sick person might be easier wrought upon, to disappoint a remote relation than a nearer, it would have been reasonable in the law to guard against that event more carefully: For example, a dying person leaving an infant-son, and perhaps a sister or sisters children, would be very hardly prevailed upon to disinherit his infant-child, but might more easily be persuaded by importunity, to substitute strangers to his own son, to the clear exclusion of his heirs in blood. And if it shall be supposed, that it was the intention of the law to prevent such abuses, reason demands, that the sanction of it should strike at that sort of abuse, which is more easily committed, with the same force at least, as against that other sort which is more difficult to be committed. It is no objection to this, that the immediate apparent heir's consent, does exclude every after-heir from quarrelling; whence it was inferred, that death-bed is only competent, when the immediate heir is lesed; for his consent has this effect, whether he or any subsequent heir suffer by the death-bed deed, in respect, *1mo*, That thereby all suspicion of fraud or imposition is taken away; and, *2do*, That the consent is *fictione brevis manus*, of the same import, as if the dying person had disposed to the heir, and the heir in *liege poustie* had conveyed to the stranger, which would exclude all possibility of challenge, at the instance of the remoter heir.

"The Lords found the action of death-bed competent to Mr Arbuthnot, though a remoter heir, notwithstanding that the nearest heir was the substitute."

N° XXXIV.

18th July 1722.

HUGH SCOT now of Gala, *contra* the PERSONAL CREDITORS of the deceased Sir JAMES SCOT of Gala.

1. *The bare contracting of Debt makes not an Irritancy, but allowing it to be made real upon the tailzied Lands.*
2. *Incurring an Irritancy of a Tailzie, takes not away the Liferent-escheat of the Committer already fallen.*

SIR JAMES SCOT, heir of a tailzied estate, with resolute and irrisant clauses, *de non alienando et non contrabendo debitum*, during his incumbency contracted considerable personal debts; upon which diligence following, a gift was taken of his single and liferent-escheat, in name of the deceased Lord Bowhill, who granted backbond to be accountable



accountable to the creditors. After Sir James's decease, Hugh Scot now of Gala, raised a declarator of irritancy, wherein he insisted to have the gift of escheat declared void, and the profits of the estate from the incurring of the irritancy, even those that arose and fell due during the life of Sir James, to belong to him as heir. And it was pled for him, that though no adjudication was led against the tailzied estate, till after the gift of escheat, the personal debts contracted *anterior* thereto, was a sufficient irritancy, expressly contravening the clause *de non contrahendo debitum*; upon which the contravener falling *ipso facto* from his right, his escheat could not be gifted thereafter, in prejudice of the next heir of entail.

To which it was answered, It is not the contracting of debt, that makes an irritancy, but the allowing that debt to become a real burden upon the property, whereby the same might be evicted from the heir of tailzie. This is clear from the words of the act 1685, "It shall be lawful to affect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie, to sell, anailzie, &c. or contract debt, or do any other deed, whereby the same may be apprised, adjudged, or evicted from the others substitute in the tailzie, or the succession frustrated or interrupted." There the prohibitory clause is as to the contracting debt, whereby the estate *shall* be adjudged or evicted; for as the words *may* and *shall*, are, according to our manner of speaking, the same in grammar, so here they are plainly the same in meaning. If then, though a debt be contracted, the estate *shall* not be evicted thereby, there is no irritancy incurred, and no manner of reason why there should; for if this were law, no heir of entail could enjoy his estate a week, without incurring an irritancy; he could have no commerce with mankind; he could make no bargain, not even for necessaries; nor use his credit in any way, though over and above an entailed estate, he had other funds ten times greater than his debts; for still if the simple contracting of debt be an irritancy, the moment he becomes bound, he hath incurred it, be his other estate what it will. It may indeed be pretended, that these inconveniencies are salved, by allowing the heir to purge before declarator. But, *1mo*, This is not in the law; and it is ridiculous to suppose, the Legislator would make such a law, unreasonable in itself, and which every heir of tailzie must contravene every day, only because the injustice of it could be mollified by a soft interpretation. But, *2do*, Allowing the heir to purge, does by no means remove either the injustice or the hardship: As to the injustice, what imaginable reason can be for it, that one who intends not to frustrate the succession of his heir, nor to burden the entailed estate, should be brought under an irritancy in strict law, by dealing in a common way of commerce, which will necessarily require borrowing of money upon several occasions, by dealing even to the advantage of his heir of entail. As to the hardship, let us suppose a case, a man hath an entailed estate, he contracts a good deal of debt for useful purposes; he hath a sufficient unentailed estate, much more than to answer all that debt; he comes to be attached by declarator of irritancy; he cannot clear that debt, before decret of declarator, and perhaps it were the vastest loss to oblige him to it: In the mean time, none of the debt is charged upon the entailed estate; must it nevertheless be judged he hath

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incurred an irritancy, or would the power of purging salve the inconveniencies? There needs no more be said to illustrate this point, but to reflect, if any thing earthly could make up the inconveniency, of a man's being subjected every day of his life to a declarator of irritancy. It might likewise be noticed, that this doctrine is inconsistent with the nature of the thing: It is a very natural effect of property, that a man should have power to burden the right of his own estate, with what conditions touching that estate he pleases; but that he should bind up an heir as to other things, than what concerns the estate, is unreasonable; therefore when a proprietor throws this condition into an entail, that his heir shall not contract debt; by the nature of the thing, and from consideration of the fountain from which the power of throwing in such conditions flows, to wit, the dominion in the estate, it must be a contracting debt upon the estate. Upon these grounds then, were there no more, the gift of escheat must be supported; for being lawfully completed before the irritancy incurred, no after-deed of omission of the heir of entail, will cut it off, especially not being a right inconsistent with the tailzie, or which could frustrate the succession of the heir, but only a right to the profits during that heir's life.

It was pled in the *next* place for the heir, there is the same reason for making the actual contracting of debt an irritancy, as where an adjudication is led; because the law declares the adjudication void, and the estate is not evicted, or the heir prejudged any more by the adjudication, than by the contracting of debt. To which it was answered, The reason why the estate is not evicted by the adjudication, is plainly because suffering the adjudication to be led is an irritancy of the proprietor's right, whereby the adjudication is rendered ineffectual, as being led against a *non dominus*; without which there could be no way to prevent a tailzied estate from being torn to pieces by adjudications: And this is the precise reason why this alone, and not the simple contracting of debt, makes an irritancy.

There was a *second* point insisted in by the pursuer, as follows, Granting the bare contracting of debt to be no irritancy, granting also, that the liferent-escheat of Sir James Scot was duly established, it could yet be no longer effectual, after the first adjudication was laid upon the estate; for thereby without controversy, the proprietor fell from his right *ipso jure*; the superior could not continue to claim his liferent of the lands, because the rebel no longer existed his vassal; and the escheat can last no longer than the vassal's right. In prosecution of this point it was urged, that clauses *de non alienando, et non contrabendo debitum* are generally conceived, so as to make the contravener *ipso facto* or *jure*, fall from his right upon incurring the irritancy, and that without any declarator: A declarator indeed is necessary and infestment thereon, to establish the right in the next heir of tailzie; for consent alone is not sufficient to transfer dominion, infestment in every case being a necessary solemnity; but clauses so conceived are sufficient to *extinguish*, though not to *transfer*, and therefore it may be thought, that *ipso facto* or *jure* upon the incurring of an irritancy the contravener's right ceases: Nor is the superior any way prejudged, because the lands thereby fall in non-entry, and he has the interim profits; which is all that can be inferred from the act 1685, reserving the casualties of superiority notwithstanding of tailzies:



tailzies: For that act can never be interpreted to reserve casualties inconsistent with the nature of the thing, which a liferent-escheat certainly is of lands whereof the rebel is not proprietor. And were this matter otherwise ordered, great difficulties might arise; for if even after contravention, the contravener remain proprietor, it is not easily conceivable, how the estate can be secured against the diligences of creditors. An adjudication, if it once become real upon a tailzied estate, can never be extinguished but by satisfaction; and every adjudication may become real, upon this supposition, being led against a debtor, who continues proprietor even after completing thereof: Nor will the power the contravener has to purge before declarator remove the difficulty; for what if through negligence, or perhaps inability, he allow the declarator to be taken out? In such a case the adjudication becomes unavoidably a burden upon the tailzie, expressly contrary to the invention of the maker: Nor is there another remedy than what is of common use, *viz.* to make the heir, *ipso jure*, fall from his right upon the leading of an adjudication, whereby it can never become real upon the estate, since the very act that would establish the adjudication, makes the heir's right cease, and of consequence the adjudication also, which is built upon the heir's right.

The creditors framed their answers after this manner, That as to the benefits and casualties belonging to superiors as such, none of the acts anent tailzies have in the least impaired them. As for the act 1685, the Legislature intended to confirm the powers arising to the proprietor *jure domini*; such as the burdening that property so far as truly his own, with what clauses and conditions he pleases, which are to be effectual among his heirs and successors to the utmost extent: But it was never intended, that these powers of the vassal, which he hath upon his own property, should prejudice the right of the superior. Accordingly it is observable, that the words of the act of Parliament are entirely directed towards the vassal, "That it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to substitute heirs," &c. not one word of the consent of the superior: Yea, it does not appear from this act, that the superior could by any means refuse to allow the irritant and resolute clauses to be insert in the infeftments: Is it then to be imagined, that the Legislature intended to subject the rights of the superior, to the arbitrary pleasure of the vassal? Surely it cannot be thought; and this consideration destroys the only colour of argument could be used in this case, *viz.* That the consent of the superior intervenes, and that he may bind himself. To come close to the pursuer's argument, it can never be said, that the superior's casualties are reserved, when he gets only the non-entry duties, which the next heir of tailzie can at any time deprive him of, by entering vassal, instead of the escheat commensurate with the former vassal's lifetime. The escheat once established, is a casualty of superiority; it must run its course, and no deed of the rebel can take it away, whether voluntarily alienating the lands, or voluntarily incurring an irritancy. To confirm this, let a case be put of an heir of entail, who forfeits for himself and the descendants of his body; that his heir is minor, and that the first of the next branch is major: It is impossible to doubt from the act, that the ward would fall, by the death of him who incurs the irritancy; and



and it can never be said, that the first of the next branch, by entering heir, has it in his power to cut short the superior's casualty of ward. Nor is there any manner of inconsistency in all this; for it is no more but saying, that the right of the vassal may be qualified or voided, with regard to his heirs, without hurting the right of the superior: Thus, in the present case, the liferent-escheat of a vassal being once fallen, it becomes to the superior a temporary *real right* in the vassal's lands; which real right continues during the vassal's lifetime, whether he continue to be vassal or not. And in this a liferent-escheat differs from a common assignation to mails and duties, which being no *real right* in the lands, but depending upon the cedent's right, whenever that ceases, the assignation ceases of consequence.

"The Lords sustained the liferent-escheat."

N<sup>o</sup> XXXV.

9th November 1722.

MARGARET FULTON and MARGARET CLARK *contra* MARGARET BLAIR.

*A Donation mortis causâ, cannot be constituted by a Bill.*

**T**HE now deceased James Blair, upon death-bed, granted bills to the pursuers for L. 200 Sterling, for payment of which, they insisted against Margaret Blair, the defunct's sister, upon the passive titles. It was acknowledged by the pursuers, "That there was no value paid for the bills; that they were granted and accepted by James Blair, for *love and favour*; that when he accepted the bills, and delivered them to the pursuers, he was indisposed; and took them engaged by promise, not to shew them to any body, so long as he lived; and that if he lived, and came to better health, they should give him back the bills." The bills being thus acknowledged donations *mortis causâ*, it was objected by the defender, that a legacy, or *donatio mortis causâ*, cannot be habily and effectually constitute by a bill, bills being introduced for facilitating commerce, not to convey gratuities.

It was answered, That a donation *inter vivos* is habily constituted by a bill, much more a *mortis causâ donatio*, for this reason, that many of the forms, essential to deeds *inter vivos*, are remitted in such as are of a testamentary nature. The pursuers admitted the question would have been much narrower, if the bills had expressly born the cause of granting, because bills are writs of a certain determined form and stile; and if in any measure the writ transgresses that form and stile, it is no bill, and has no privilege: But whatever be the cause of granting, whether it be designed a *mortis causâ* deed, or *inter vivos*, if the writ expresses no more but, *Sir, Pay to Titus or his order, the sum of blank*, it is a good bill, and enjoys all the privileges; and this is according to the maxim, *expressa nocent, non expressa non nocent*.

Replied, A donation, whether *mortis causâ* or *inter vivos*, cannot be constituted by a bill. Bills have their proper subject to which they are confined, namely, *exchange and commerce*; and when they relate to other subjects, they have no manner of privilege, but must be found null



null by the acts of Parliament relating to the solemnities of writs. And there is reason as well as custom for this, because in all civilized countries, commerce has been highly cherished: And truly besides the favour, there was a necessity from the nature of the thing, that some short form of writing should be authorised, for facilitating the transactions and dealings among traders; which, were they confined to the ordinary forms necessary in other cases, would in a great measure be inextricable. Now, neither the favour or necessity of the case, can apply to donations in any degree. Add, that the quickness, with which these bills circulate, being generally accepted, negotiated and discharged within a narrow circle of time, is a sufficient guard against forgeries, which they would be greatly subject to, were they allowed to be proper vehicles, for conveying gratuities *inter vivos* or *mortis causâ*. The pursuers acknowledgment, that a bill cannot be in the form or style of a *mortis causâ* donation, is an unwary giving up of the cause. Can a tolerable reason be assigned, if a bill may relate to a *mortis causâ* donation, that this relation must not be expressed in the bill? The defender takes it for a general rule, without exception, whatever is the true and lawful *cause* of granting a writ, may truly and lawfully be expressed in the writ; and she submits it, if their acknowledgment does not turn strongly against the pursuers, That since a *mortis causâ donatio* cannot be expressed in a bill, a *mortis causâ donatio* cannot be the *cause* of a bill; and that a bill is not the proper vehicle for such conveyances.

“ The Lords found, That a legacy or *donatio mortis causâ*, cannot  
“ be habily and effectually constituted by a bill.”

N<sup>o</sup> XXXVI.

November 1722.

#### Competition of the CREDITORS of Tofts.

*An Inhibition sustained, though not special as to the Sums.*

**I**N the competition of the creditors of Tofts, the following objection was made against an inhibition, at the instance of Susanna Belches of Tofts, *viz.* That it being served upon a dependence, did not mention that the conclusion of the libel was special as to the sum or ground of debt, for which the process was raised; which it ought to have done, in order to ascertain the lieges of the extent and import of the diligence; otherwise it would be in the power of a malicious creditor, by an inhibition upon any small sum, to disable the most opulent person of all manner of commerce, seeing the creditor being master of the principal summons, on which the inhibition proceeds, it is impossible to be apprised of the extent of the debt, or condition of the debtor; and this inconvenience may continue for many years, seeing a depending action may be preserved for 40 years, by a wakening every seven years: And although the same did terminate in a decret, the discovery, even in that case, would be attended with difficulty, the records of the Session being appointed for execution or conservation, not for publication.

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It was answered, There are many proceffes, wherein a definite fum cannot be condescended on in the libel; such as counts and reckonings, &c. no body doubts, that such summons may be relevantly libelled in general terms; and indeed in such it is more reasonable, to lay the claim in general, than to libel at hazard great fums, when upon a disquisition, there may only remain a small balance. As this way of libelling is admitted in practice, and most justifiable in itself; and since the law allows inhibition upon every depending action, the inhibition must receive its form and shape from the action whereon it is founded, which, in the present case, was a count and reckoning against a tutor. And if debtors think this sort of diligence a hardship, they have an easy remeid, by a proper application to the Lords, from whom they will obtain either a liquidation or restriction of the fum for which the inhibition is served.

“ The Lords sustained the inhibition.”

N<sup>o</sup> XXXVII.

15th December 1722.

ALEXANDER MURRAY of Broughton *contra* the HEIR and CREDITORS of Orchyardtoun.

*Obligation of Mutual Relief has place amongst Cautioners, though not bound at the same Time, or the same Deed.*

**I**N the year 1674, Sir Alexander Macculloch and Godfrey his eldest son, as principals, and with them Sir Robert Maxwell of Orchyardtoun as cautioner, became bound to Alexander Macghie of Balmaghie, in a bond of 2000 merks, with annualrent from Whitsunday of the same year. In the year 1679, Sir Godfrey the son, as principal, and with him the Viscount of Kenmuir, and Alexander Murray of Broughton, as cautioners, grant a bond of corroboration, reciting the former bond, and subsuming (according to the usual form in such cases) “ That Balmaghie was content to supersede execution, upon  
“ granting the security after mentioned; therefore the saids principal and cautioners, in further corroboration of the foresaid bond,  
“ bind and oblige them to make payment of the said principal sum  
“ allenary, with the annualrent from Martinmas 1679.” And this bond contains a clause of relief from the principal to the cautioners, and a relief *pro rata* betwixt the two cautioners themselves. Alexander Murray of Broughton having made payment of this sum to the creditor, takes assignation against the principals and cautioner in the original bond; and by reason of the insolvency of the principals and their representatives, insists against the representatives of the cautioner for the whole fums contained in the assignation.

It was alleged for the defenders, That they could only be liable in the half, by reason, that in the construction of law, the cautioner in the first bond, and the cautioner in the bond of corroboration, were co-cautioners, which implied a mutual relief.

It was answered for the pursuer, *imo*, That though in the common case, where more cautioners are engaged in the same act obligatory to pay, there arises a mutual relief from the law, and the presumed consent;



consent; yet in this case, where, after the act of cautionry is complete, and the several reliefs settled by law, a new person intervenes, and in corroboration of the original obligation, binds himself to the creditor to perform, there is no relief competent to the original cautioners, against such subsequent obligant; the reason of the difference lies here, that when any number of persons enter into an engagement of cautionry, as they are supposed to know each others circumstances, are presumed to trust to one another for relief; but when a new man, not concerned in the original engagement, becomes bound *ex post facto*, this circumstance could not have been under the cautioners view, when they contracted originally, they could have no view of an additional security from such an event: And therefore it is not easy to be conceived, upon what ground of law they can claim any benefit by it. *2do*, This will the rather appear, if the nature and purpose of the engagement be considered. Mr Murray became cautioner in the bond of corroboration, he thereby subjected himself to the creditor for his security; but it must be understood that he meant to provide for himself in the second place, by securing a relief against all the persons bound in the former bond: Now, had it expressly been stipulated in the bond of corroboration, that upon payment by the cautioner in the corroboration, the creditor should assign him to a full relief against all the other debtors, there can be no doubt but the cautioner would have been entitled to a full relief; for such might be argued, were the terms of the engagement, without which he would not have acceded. But whatever would be the effect of such a clause had it been expressed, will be the effect where it is implied, as it certainly is here from the nature of the engagement and design of parties. *3tio*, The granter of such corroborative security is more properly a cautioner for the original cautioners, than a co-cautioner with them; for the very name of corroboration imports that it is granted in aid of the bond corroborated, with all its qualities and accessories, principal as well as cautionry: And in this view, the principal and cautioners in the first bond became all as principals with respect to the persons corroborating, who, in effect, became cautioners entitled to a full relief.

To the *first* it was replied, That the relief here arises without any consent express or tacit, from this plain principle of equity, "That where there is a common obligation, to which all are equally subjected, it ought not to be in the power of the creditor, arbitrarily to load any one of the debtors he pleases with the debt; and therefore, though for the ease of the creditor, each may be made liable for the whole, yet since they are all in *pari casu*, that rule of equity dictates, whatever is advanced towards the discharge of the obligation by any of them, more than his share, may be recovered off the rest, to preserve that original equality which is their common interest to preserve." If this rule had not place amongst us, many hardships would follow: Let us suppose, for one example, a third party corroborating a bond, and after that another corroboration granted by the principal debtor, and others bound cautioners for him; is it to be believed that those cautioners for the principal debtor would have relief of the whole from the first corroborator? and yet



yet upon the pursuer's principles that must follow: for *nullum negotium gerebatur* between these cautioners and the corroborator: Let us suppose that ten different people had by themselves granted bonds of corroboration, some of them with cautioners; is it reasonable the creditor should have it in his power to make any of them pay the debt without relief, all of them being bound *in solidum*? Surely it cannot be thought: Wherefore the rule must be without regard to the dates of their bonds; as cautioners in the same obligation, they are liable in mutual relief; and the cautioners granted by them, must be liable according to the proportion of their principal. And still in all these cases, there is no tacit paction of relief; they may probably not so much as know of one another: The proposition is, that relief has its rise from the several cautioners being bound *in solidum*, in the same sum for the same principal debtor; and the interval of time or place makes no difference in equity. Nor is the rule of equity confined to this case, it is upon the same principle, that a creditor having a catholic preferable interest for the same debt in different subjects, cannot arbitrarily draw his whole claim out of any one of the subjects, to the exclusion of the creditors that have the less preferable rights in that subject; but must draw out of each proportionally, that all may be burdened equally; or if he choose to draw his whole out of one subject, he must assign to the creditors thereby excluded, proportionally against the creditors upon the other. To the *second* argument replied, Since the clause argued upon was not expressed, it affords an argument that Mr Murray had no view to bind himself otherwise than simply as cautioner, relying upon the relief provided him by the law: For a clause of this nature will never be implied; these clauses only are implied, without which the contract cannot have its course and effect; never these, in abstracting from which, the contract is consistent and effectual. Thus, because Mr Murray bound himself as an additional security to the creditor, it is not therein necessarily implied, that the creditor upon payment is obliged to assign, further than the law otherwise obliges without any such implication. It is a perfectly consistent transaction, that one should become a cautioner, make payment to the creditor, recover a proportion off the other cautioners by a legal relief; and all without any express or implied obligation upon the creditor to assign to him upon payment. If a cautioner therefore, acceding to a bond of corroboration, is resolved not to rest upon the legal relief; but declares as a provision in his becoming cautioner, that he will have full relief off all the former debtors; and for that end, the creditor shall be obliged to assign him upon payment; such a clause must be expressed, for it never will be implied: It is true, that upon the creditor who has got payment from a cautioner, an obligation arises not from an implied consent, but *ex bona et æquo* to assign him for his relief; but then the question returns, how far? against the principal debtor no doubt *in solidum*; but against the co-cautioners who are *in pari casu*, for the reason above given, it is still thought this obligation *ex bona et æquo*, can never extend an assignation further than *pro rata*.

Replied to the *third*, That as the circumstances of this case stand, it seems impossible to affirm, that Broughton was cautioner for cautioners,



tioners, seeing he himself did not corroborate, but became cautioner for the principal debtor corroborating: This principal debtor did not by the corroboration surely, take upon him the obligation of his own cautioners; but his former obligation by a second consent was confirmed and established; and for the performance of that obligation so undertaken, Broughton became his cautioner: How then can it be said that he was cautioner for the former cautioners? The defenders therefore conceive that the corroborating of the first obligation, is so far from being an argument for Broughton, that it is directly against him. If a new bond had been granted by the principal for the said sum, without a corroboration of the former, it might with more reason been pretended that Broughton did not accede as cautioner to the first obligation: But where the first bond is corroborate, and he becomes cautioner, there he plainly accedes as cautioner to the first obligation, and is not only bound for the same sum, but truly, in the eye of the law, is bound as if his name had been in that first obligation; so that, upon consideration of the whole, the creditors cannot find any speciality, arising from the form of the writings, that favours Broughton, but rather otherwise; and so the decision must go upon the common rules of law and equity.

“ The Lords found, that Broughton, the petitioner’s father, cautioner in the corroboration, could only have relief as co-cautioner.”

N<sup>o</sup> XXXVIII.

January 1723.

Competition betwixt Sir JAMES GRAY and EDWARD CALLENDAR.

*A general Assignation.*

**T**HE Duke of Hamilton, executor confirmed as nearest of kin to his father, raised a process of multiple-poining against his father’s creditors, wherein comparance was made for Sir James Gray and Edward Callendar, whose respective interests stood thus. Edward Callendar was creditor to the late Duke in L. 900 Sterling, for which he had obtained a decret against the present Duke, as executor confirmed before the Commissars of Edinburgh. Sir James Gray was creditor to the late Duke in L. 1400 Sterling, and for his further security, obtained an assignation from him, “ Of as much of the first, best, and readiest of the rests of the rents of his lands and estate in Scotland, that should happen to be due to him the time of his decease; and in and to as much of the first and readiest of his hail moveables, goods, gear, debts, sums of money, and others whatsoever, that should happen to pertain and belong to him the time foresaid, as would completely satisfy and pay the said sum.” This general assignation was intimate to Mr Crawford, then factor on the Duke’s estate, in March 1714, some time after the Duke’s death, but long prior to this Duke’s confirmation.

Sir James craved preference upon his assignation, which being the first completed right, took the subject out *è medio*.

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It was objected for Mr Callendar, That this being a general assignation, by the act 26. p. 1690, expressly needs confirmation. It was answered, That as to the rents of the Duke's estate in Scotland, due at the time of his decease, the assignation was special, Sir James being assigned to the special sum of L. 1400, out of the first and readiest of these rents; and therefore, as to these, he ought to be preferred. And it was contended, that there is the same reason, why this assignation should be sustained without confirmation, as any other special assignation whatever. It seems, indeed, the great care of our Legislature, that the goods of defuncts be not embezzled; and matters have been ordered so distinctly, that defuncts goods cannot be intromitted with, but that there shall be a clear charge against the intromitter. This if it did not introduce, has occasioned the continuance of confirmation in general dispositions and assignations, which otherwise might be completed in the disponent or assignee's person, by possession in moveables and intimation in debts, the same way as an adjudication or disposition of heritage is completed by infestment after the debtor or disponent's death. In this view, there can be no necessity of confirming this assignation, in so far as it relates to the bygone rents; because the assignee cannot possibly intromit with any parcel of these rents, without, at the same time, making up a distinct charge against himself, by his receipts of payments made to him by the factor, which the factor must keep for his own exoneration, and which always will remain a standing charge against the assignee.

It was replied, That whatever may be argued, this is certainly a general clause; there is no particular debtor mentioned, nor special sum due, it being even uncertain, whether any should happen to be due or not; and so falls both under the meaning and words of the act of Parliament.

"The Lords found Sir James could have no preference upon his assignation."

N° XXXIX.

24th July 1723.

Duke of ARGYLE, *contra* REPRESENTATIVES of the Lord Halcraig.

*Condictio, indebiti.*

**A**RCHIBALD Earl of Argyle, anno 1672, granted bond to Mr John Ellies for 5000 merks; who, of the same date, gave a backbond, declaring, "That he had a bond from Donald and Ronald Campbells, for L. 2250 Scots, whereof if he received any part, he obliged him, his heirs, &c. to allow the same in payment of the 5000 merks." This bond of 5000 merks, coming by progress into the person of the Lord Halcraig, the late Duke of Argyle granted corroboration thereof, narrating, "That in regard this sum was by progress in the person of the Lord Halcraig, therefore he obliges himself to pay the same." All this while, the backbond was entirely unknown, either to the late or present Duke, till July 1715; at which time, by payments made, and imputing the sums contained in Donald and Ronald Campbells bond, the 5000 merks bond was not only extinguished, but a considerable sum over *indebitè* paid; whereupon



upon a process was intended against the representatives of the late Lord Halcraig, concluding an extinction of the bond, and repetition of L. 1277 Scots, paid over and above what was really due.

It was pled for the defenders, *1mo*, That the Duke corroborating the bond in the Lord Halcraig's person, and expressly obliged himself to pay, was bound to the assignee by his own contract; after which, the assignee needed not be concerned, whether any part was paid to his cedent or not. *2do*, If the debtor was ignorant of the backbond, and of any payments made to the cedent, *sibi imputet*; it is more just, the original creditor's representatives being now bankrupt, that the debtor, whose business it was to know, should suffer by his ignorance, than the assignee: The assignee, in taking the corroboration, took all reasonable precautions for his security; and he had thereby reason to rely upon his assignation, as absolutely good, and free of all exception.

Answered to the *first*, It is in vain to plead upon the corroboration, which in no view can import a more express acknowledgment of the assignee's title, than the actual payment that was made to him; and therefore since a *condictio indebiti* is competent, when payment is made *indebitè, errore facti*, which was truly the case here, the Duke not having known of the backbond, it will not be the less competent, that a corroboration intervened: And the reason of both is the same, corroboration and payment are neither of them absolute unqualified acknowledgments of the creditor's title; they go upon the supposition, that the title is otherwise well founded; if which prove false, whatever is built thereupon, must fall to the ground. To the *second* answered, If the original creditor's representatives are bankrupt, that naturally falls upon the assignee, whose faith he followed, and not the debtor. The debtor truly made twice payment, and has a *condictio indebiti*, well founded thereby against the assignee; which action cannot be taken from him, unless the assignee will qualify some fault, some negligence of the pursuer's, which yet cannot be done, by reason that the backbond truly had fallen aside long before his time, and he was noway negligent as to that matter. And if they ascribe this effect to the pursuer's inculpable ignorance, then it must follow in general, "That a debtor can never obtain a *condictio indebiti*, if "the cedent became insolvent any time after the payment, of which "repetition is sought," a position that is apprehended to be without any foundation in law: For, as inculpable ignorance is never reckoned sufficient to bear out an action of damages for reparation, as little to bear out an exception of damages, in order to take away an action that is otherwise competent.

Replied to this *last*, It is sufficient to qualify, that the loss happened through the ignorance and error of this pursuer; for since one of them must bear the loss, it is more equitable that it fall upon the pursuer who was in an error, than the defender who was in none; and no body ought to be prejudged by another's errors.

"The Lords sustained the defence, That after the assignation to  
 "the Lord Halcraig, the late Duke of Argyle did corroborate  
 "the bond assigned in the person of the said Lord Halcraig,  
 "relevant to assilzie the defender from any repetition or ex-  
 "tinction."



N<sup>o</sup> XL.

27th November 1723.

The COMMISSIONERS of the Customs *contra* Mr JOHN MORISON,  
Student in St Andrew's.

*Action is competent for the Price of run Goods, though bought as such.*

**M**ORISON having a parcel of brandy that had not paid the duty, proposes to sell it to Scot and Thomson, they running the risk of seizure in bringing it over the water from Fife: The buyers agree; and upon that account, get a considerable abatement of the price. The brandy happened to be seized by the custom-house boat; and when the seller charged the buyers upon their bills, they suspended upon this ground amongst others, That the bills were granted as the price of brandy, which they knew not at the time of the bargain to have been unentered; and that it was seized by the custom-house boat. To which it was answered at discussing the suspension, That they well knew the brandy was not entered, and that *de facto* by the bargain, the buyers were to run the risk.

Whilst this debate was in agitation, the commissioners of the customs perceiving it would give a considerable check to these unfair traders, if the credit that subsists in the transactions among them were broken, interposed by petition, craving that the Lords, before they should descend to examine the particular arguments used by the defenders for avoiding payment of their bills, would take the general point into their consideration, and find that process is not competent upon such illegal transactions.

The topics insisted upon, were two: 1<sup>st</sup>, That this was a bargain *super re illicita*; which in law can afford no manner of action to the party, who knowing it to be such, transacted upon it: That though where a thing is not simply prohibited, or *extra commercium*, there may be lawful bargains upon it, where parties act *bona fide*; yet where the parties contractors are in the full knowledge, that the thing they bargain upon, is in circumstances that render it not the lawful subject of commerce, it is *quoad* them in the same case as it were simply prohibited: It is a thing known to the buyer, to be in the hand of the seller by theft from the public, which is rather more atrocious than theft from a private person. But, 2<sup>do</sup>, (and upon this point was laid the main stress), That here there was not singly a bargain upon a commodity, knowing the same not to have paid duty; but a bargain made for defrauding the revenue, where one of the express stipulations is, the "undertaking to commit the fraud." And here the disposition of the law is clear, that a bargain being in itself unlawful, whatever either party becomes thereby possessed of, he retains unaccountable to the other; to whom the bargain can afford no action, though it may subject both to a penalty: And therefore, though the brandy had been actually received by the suspender, he could not, upon such an unlawful bargain, have action for the price. To illustrate this matter, let it be supposed the brandy had landed safe at Pinky, and that Scot and Thomson had agreed with a com-  
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mon car-man to bring his car by night to assist them in carrying off their purchase, for which he was to have ten times the ordinary wage; can it be thought, in this case, that the car-man would have action for his wages? It is believed not: And the reason is yet stronger, why Morison should not have action against Scot for the price.

To which it was answered, Were brandy altogether prohibited as to the use as well as importation, it might come possibly under the description of *merx illicita*; though, even in that case, it might be a question, "Whether the price of it, when truly bought and delivered, would not be due." But since neither the importation or the use of brandy is prohibited, since it is most certainly the subject of commerce, it is hard to find a reason why it should be deemed *res illicita*. All prohibitory penal laws, are strictly to be interpreted; and where the law has provided certain penalties, it is a rule, That none other or greater can be exacted: If the law had satisfied itself with prohibiting the importation of brandy without paying duty, and had gone no further, it is certain, that the brandy imported contrary to that prohibition, would not have been forfeited; and as the law has gone further, and has provided divers forfeitures and penalties for each transgression, this must be deemed the sole sanction with which the execution of the law is enforced; and recourse cannot be had to further expedients, until they are by statute enacted. The payment of the duty of brandy, is secured by many different precautions; if it is imported in prohibited casks, it is forfeited; if seized in running to be laid on land, or even in carrying at land, it is forfeited; if by the party's oath the importation can be proved, the duties may be recovered; the persons who run it, and those who assist in running, are liable to penalties: But here the law stops, leaving brandy still in the hands of the possessor a merchantable commodity, and allowing the use of it to all the lieges. To proceed further then, and to declare that no person who buys it is liable to pay the price, would be surely to lay a further incumbrance on that trade; but an incumbrance that has no foundation in the laws of the revenue, and that nothing less than the Legislature could induce. Were games at hazard simply prohibited by statute, without any further provision, such as play would be guilty of a trespass; but surely the bills, bonds, or other securities given for play-debts, would not be void: Which was the reason why the statutes made in that behalf added to the general prohibition a special provision, that securities given for sums lost at play should be ineffectual. It is suggested, "That any contract or agreement for running of goods is unlawful." This is admitted: And it will be plain from enquiry into the reason of this, that the single act of buying goods after they are run, is not unlawful. If a person bargains with a runner of goods, to assist him for a certain sum of money, to set these goods clandestinely on land; or if a car-man, after they are on land, should bargain privately to transport them, such persons, doubtless, are art and part of the fraud; their paction is *de re turpi et illicita*, to aid a person to trespass the law, and to defraud the revenue: If the runner's action is guilty, the action of the person assisting is no less so; and the hire or price of the guilty action, may properly fall under the *condictio ob turpem causam*.



*jam.* But when the goods are safe on shore in the proprietor's cellar, when they have passed perhaps through several hands in sale, the person who buys them, commits no trespass against the law, neither does he who sells them; because by no statute, is the buying and selling prohibited: And where there is no prohibitory statute that can be transgressed in the act of buying and selling, no illegality is committed, and consequently there is no turpitude. Every man in the nation, who purchases Burgundy or Champagne, knowing it to be imported from Holland, buys a commodity prohibited to be entered, which has paid no duty; and consequently forfeitable, since by the statute of navigation, these wines are not enterable from Holland: Every person who in Scotland buys claret, knows that he buys French wine, which has not paid the duty of French wine; and purchases it indeed as such, since he would not give the price for it, if it were Spanish, under the name whereof it is entered: What then must be said? are these purchases void? are the buyers excused from paying the price? must the bargains, which between them and the sellers are absolutely fair and just, be null and of no effect, to the sellers prejudice, without any law or statute on that behalf? one should, with submission, think this cannot be admitted without a great absurdity. Again, it is by express statute forbidden to kill salmon after a limited day; and a penalty is inflicted on transgressors: Nevertheless thousands of people trespass against this law, kill black fish, smoke them, and sell them: Should a purchaser who buys such smoked fish, knowing them to have been killed in forbidden time, pretend to avoid payment of the price on no other ground, than that the salmon caught in breach of the law was *res illicita*; it would be a good answer, That though the killing was unlawful, no law prohibited the sale; which being fair and just betwixt the buyer and seller, must, with regard to them have the legal effect. It is hinted, "That run brandy is a kind of *res furtiva*; a consequence whereof it would be, that the bargain made concerning it, it being known to be such, is unlawful, and can yield no action. But it is a point of certainty equal to a principle, That the property of run goods, prior to the seizure and condemnation, is in the private party: The Crown indeed has a right to the duty, and the goods are forfeitable if seized; but prior to the seizure there is no *jus in re* to the Crown; the owner may export, use or dispose of them at pleasure: And therefore there is no foundation to suggest, that he cannot convey the property by delivery on a sale; which certainly a thief could not. It is further suggested, "That in the case in question there was a separate consideration, which amounted to an explicate bargain for defrauding the revenue, viz. the purchaser undertook the risk and hazard of transporting the goods free from seizure." Had the purchasers (that is, Thomson and Scot) undertaken this risk for the sake of the seller, to aid him in carrying on the fraud, it is already admitted that the hire stipulated to them might be avoided: But that is not the case; Thomson and Scot made no bargain of this kind; the seller was not at all concerned what they did with the goods; and if they proposed to evade the custom-house officers, the risk was their own, and they were to account to themselves for it. On the contrary, the bargain with the seller consisted singly in this, that he was to receive the price, and deliver



deliver to them the brandy; and that after it was in their possession, he was to be no further concerned: For the meaning of undertaking the risk *rei venditæ*, is no more than negative as to the seller, that he is no further obliged than to deliver the goods; the consequence whereof is, that the buyer naturally undergoes the hazard of goods which by delivery are his own.

“ The Lords found, That action on the bills in question, for the  
“ price of run goods, though bought as such, is competent.”

N<sup>o</sup> XLI.

December 1723.

The HEIRS of Ruffel of Gartness, and MORE their Assignee, *contra*  
WADDEL of Easter Moffat.

*Discharge of a Thirlage.*

THESE pursuers insist in a process of abstraction against the said Waddel of Easter Moffat, and as their title produce a disposition from Anna Duchess of Hamilton, in October 1657, not only of the mill of Gartness, with the multures and sequels, but *per expressum* disposing the multures and sequels of several tenements of land, as thirled and astricted to the mill of Gartness, and amongst others, the multures and sequels of the lands of Easter Moffat. It was pled for the defender, That he derived right by progress from Cunningham of Gilbertfield, who, as appears by the transcript of a charter from the family of Hamilton in the year 1611, had the right of the lands of Gilbertfield, whereof Easter Moffat was a part, *Tenendas per omnes rectas metas prout jacen. in longitudine et latitudine, in omnibus ædificiis, molendinis, multuris et eorum sequelis, &c. reddendo denarium nomine albe firme, si petatur tantum, pro omni alio onere.* And they contended, that their authors having a charter *cum molendinis et multuris* in the *tenendas*, and likewise bearing in the *reddendo* a blench-duty *pro omni alio onere*, long before the disposition of the lands of Gartness and mill, this imported a liberation and discharge of any former astriction; and therefore the astriction of the lands of Easter Moffat, by the disposition, charter and infeftment 1657, was *à non habente potestatem*.

“ The Lords sustained the defence of immunity, by virtue of the  
“ defender’s charter *cum molendinis et multuris* in the *tenendas*, and  
“ a feu-duty *pro omni alio onere.*”

N<sup>o</sup> XLII.

7th January 1724.

HOG of Harcarfe *contra* Earl of HOME.

*In the Division of Commonities, a Præcipuum due to the Proprietor.*

HOG of Harcarfe having a servitude of feal and divot, and common pasturage in the muir of Fogo, belonging in property to the Earl of Home, insisted in a division upon the act 1695; which the Lords sustained, though he had only a servitude, and not a joint property.



property. And it being pled for the proprietor, That in the division he ought to have a *præcipuum*, in competition with the other parties, whose rights were only servitudes of *common pasturage, feal and divot, &c.* which servitudes, though possibly entitling them to as great a quantity of each kind, as the property gives to the proprietor, the property does yet carry a right to all mines, minerals, &c. within the surface, which those having only servitudes, have no pretence to.

“ The Lords found, The proprietor ought to have a fourth part  
 “ of the muir allocate to him, *tanquam præcipuum*, as the value  
 “ of his property, and that the remainder ought to be divided  
 “ proportionally, conform to the act of Parliament 1695, a-  
 “ mongst the neighbouring heritors, who have possessed the  
 “ same as commonty; allowing the proprietor likewise a share  
 “ in that division, effeiring to his lands, whereof the tenants  
 “ have had promiscuous possession with the heritors of the do-  
 “ minant tenements.”

N° XLIII.

7th January 1724.

JAMES MITCHELL *contra* WILLIAM PETRIE.*Usury probable by Witnesses.*

**J**AMES MITCHELL, upon the 15th of March 1723, granted bond to William Petrie, for the sum of L. 2034 Scots; of which bond he insisted in a reduction, upon the head of *usury*, narrating, That this bond was made up of several former debts, some of which were not payable till Whitsunday and Martinmas 1723; and condescended upon the following particulars, *1mo*, That the creditor exacted payment upon the said 15th of March, of annualrents that were only to fall due at Whitsunday thereafter. *2do*, He exacted a bill at the same time, for the annualrent that was to fall due only at Whitsunday 1724, which was paid in a few days thereafter; notwithstanding the debtor had likewise paid L. 20 Sterling of the principal sums: So that there was not only a fore-hand payment of annualrent, before it was due, but the exaction of the annualrent of L. 20 Sterling for a year, more than the new bond was granted for. All which particulars the pursuer offered to prove by witnesses present at the transaction, who assisted in the calculation of the annualrents, and saw the money paid; one of which is likewise an instrumentary witness in, and writer of the bond craved to be reduced.

It was objected by the defender, That by act 7. *Parl.* 16. James VI. *usury* is only probable by instrumentary witnesses, and not by extraneous witnesses.

The pursuer insisted, That the genius of our law has favoured the easy proof of *usury* so far, as even to allow the oath of the person guilty to be taken against himself, contrary to the practice in other crimes; yea even to allow the oath of the debtor to be taken in conjunction with other proof, and that because of the nature of the crime, and if there be not a greater indulgence given in the proof, that



that oppressive practice would be carried on with impunity: And it cannot be thought ever to have been the intention of our law, to allow such a latitude in some respects as to the proof of this crime, and in other points not to allow a pursuer the benefit of such proof as by our own practice, as well as the law of nations, is competent in the proof of any other delinquency; since every other crime may be proved by witnesses, even the emission of words. And although the proving the delict may have an influence as to the taking away a writ, (which our practice allows not directly to be taken away by witnesses) that does not at all hinder the *delict* to be proved by witnesses: And so it is known, that in reductions upon the head of *force*, the *violence* may, and is every day proved by witnesses, even others than instrumentary witnesses: Just so in the case of *fraud*, the previous communings, and communing that passed at the time of granting the deed, may be proved by any witnesses; more especially where there are circumstances that make it appear that such witnesses were communers, and had any concern in the transaction: And indeed were it otherwise, such things could not be proved at all. The Lords have had lately several actions for avoiding bills elicited by force and fraud, and indorsations of bills, where the indorser's name hath been fraudulently filled up; in all such cases they have not only allowed, and most justly, a proof of the direct fact of *extorting* the bill, *eliciting* it by undue means, or unwarrantably filling up an indorsee's name; but they have allowed a proof by witnesses of *circumstances* from which such things might be inferred, notwithstanding the pretence that writ could not be taken away by witnesses. The Lords do not indeed allow payment of a bond by witnesses, where the bond itself appears undischarged and uncanceled; because of the most pregnant presumption, That a debtor will not pay, without retiring his obligation, or getting a discharge: But as to the cause of granting of writings; as to the way and manner of extinction of writings when they appear cancelled and retired, and as to the manner of eliciting of writs, those things are proved by witnesses every day; for were it otherwise, there would be an utter impossibility of detecting any of these under-hand dealings, it being easy so to manage as to leave no evidence by writing. In the case of usury, there is yet more occasion for full liberty of proof, than in any other; because it is more latent, and exacted generally in such a manner, that it is impossible even the instrumentary witnesses can know any thing of it: Besides, it is in every case easy to evade this method of proof by instrumentary witnesses; for the usurer has no more ado, but to take a bill or holograph bond. As to the act 7. *Parl.* 16. James VI. upon a narrow view it will be found nothing for the defender, being far from confining the proof of usury to instrumentary witnesses: For explaining of which, let the act 251. *Parl.* 15. James VI. be considered, intituled, "It is not leifum to take mair annualrent or profit nor ten  
 " for the hundred:" By that act it is statute, "That all usurious  
 " bonds, &c. made in defraud of the statutes of usury, should be null  
 " and of none avail; and the nullity receivable summarly, as well  
 " by exception and reply, as by way of action; and to be tried by  
 " the oath of party, and all other lawful probation conjoined therewith,  
 " competent of the law, whereby the said unlawful oker may be verified to  
 Y " the



"*the judge.*" This clause of the act rendered it doubtful, if the oath of the party from whom the usury was exacted was not a necessary part of the proof of *usury*, so as that even where there was other lawful evidence, there was a necessity to take the oath of party. The act 7. *Parl.* 16. was made, as the title bears, to explain that former act: What it declares is, "That it shall be leifum to prove the taking of unlawful exorbitant profit for sums of money, by writ, or oath of party receiver of the unlawful profit, and by the witnesses insert in the securities made for the sums; *without receiving of the oath of the party giver of the saids unlawful profits.*" All then that this act determines is, that it should be leifum to take a proof by oath of the creditor, or instrumentary witnesses, without the oath of the debtor; that is, it takes away the necessity of the debtor's oath, which the former act seemed to have imposed; but does not tie down the proof to be by instrumentary witnesses, or oath of the creditor. It might with more colour of reason be argued, that other proof could not be taken without the oath of the debtor, and that where the proof is not either by the oath of party or instrumentary witnesses, there the probation must proceed in the terms of the former act, *Parl.* 15. by the oath of the debtor, and other lawful proof conjoined: Such reasoning would be more congruous to the words of the act of Parliament, though it is acknowledged, the law has not been so understood; the act 7. of the *Parl.* 16. has been looked upon as an alteration of the law in that point, that the oath of the debtor is not to be received; but on the other hand, it never was thought, that the last law took away all proof by witnesses, other than instrumentary: The words say no such thing; if the law has taken away that of the oath of the debtor, it has left the other lawful proof entire, which by the former law was to be conjoined with the debtor's oath. And indeed it is worth observing, that the law of the 15th *Parl.* does not tie down the judge to any kind of proof, or any number of witnesses, but such proof as may *verify* to the judge, that the usury has been taken. And therefore Sir George Mackenzie, in his chapter on *Usury*, lays it down as a rule, that it may be proven by *oath, writ or witnesses*, without mentioning instrumentary witnesses. And were there any difficulty in the case, as indeed there seems to be none, it is obviated by the act, the 12th of Queen Anne, whereby usury in the two kingdoms is reduced to the same standard: It were strange, if after this act, the same person convened in Scotland for usury should be assailed, and in England for the individual same fact, should be condemned, though in both nations the trial were upon the same statute; surely the Legislature never designed such an absurdity; and therefore, since if Petrie had been pursued in England upon this libel, witnesses would have been admitted, they ought likewise to be admitted, when the process is carried on in this place.

It was answered for the defender, The act of Parliament is directly for him, in spite of the gloss put upon it by the pursuer; the first statute that regards the present question, is the act 251. *Parl.* 15. James VI. which, as to the manner of probation of usury, says no more, than "that it shall be tried by the oath of party, and all other lawful probation conjoined therewith, competent of the law." This act, as appears by the preamble of the act 7. *Parl.* 16. James VI. made



made within three years of it, bred such disputes about the generality of the phrase, "Oath of party, and all other lawful probation," that an explication by statute was necessary; and therefore in the 7th act, two things are cleared, 1<sup>st</sup>, That by the *eath of party*, is meant the oath of the receiver of the usury, and not of the giver. And, 2<sup>dly</sup>, That by the words, *all other lawful probation*, is meant writ, and the evidence of instrumentary witnesses: The words are, "It shall be leifum to prove, &c. by writ or eath of party-receiver of the said unlawful profit, and by the witnesses insert in the said security made for the said sums, without receiving the eath of the party-giver of the said unlawful profit." By the first act, the words, *all other lawful probation*, included witnesses of all sorts, by the general force of them, though a good deal of reason stood against allowing any witnesses, but instrumentary; there could then on that article be no doubt, but what was occasioned by the opposition betwixt the force of the general words, and the reason of the thing; and when by the subsequent law, that doubtfulness is cleared, by directing that proof should be made by the instrumentary witnesses, it is contrary to all rules of interpretation, to imagine, that other witnesses may also be received, especially when the disposition of our law, that forbids writ to be taken away by witnesses, and the public utility requires the restriction to instrumentary witnesses only, in the words of the statute. And truly in cases of usury, where an estate is to be gained, by proving the single act of paying, receiving or retaining L. 5 Scots irregularly, if witnesses picked up by chance were receivable, all the securities of the nation would be at mercy; and could last no longer, than till a wicked debtor should find two witnesses, no honefter than himself, to prove, what indeed would be equal to a discharge of the debt. Now this reasoning excludes not instrumentary witnesses, because they are presumed to be chosen by both parties, to testify the truth of the transaction; but if the evidence is allowed to go beyond them, it may go on *in infinitum*. It is allowed, that what the defender is pleading, tends to restrict and make it more difficult to prove usury; but there is a solid answer to this, The fear that usury pass unpunished, is not a consideration sufficient, to admit of proof by foreign witnesses, because where in fact there are no witnesses, to the retaining or receiving a *premium*, usury of course must be left unpunished; and it is constantly in the power of the usurer, and generally practised by such vile people, to take their *premiums* privately; so that except by the most heedless of that gang, there is no possibility of discovery left. How then does this question come out? An usurer generally takes his *premium* in a private manner, and always will, if he is under any jealousy of complaints; so that hereafter, there shall never be a possibility of detecting usury truly committed, but by producing witnesses, who shall swear to what they never saw; and in that case, proof by witnesses not instrumentary, will be altogether fruitless toward the end proposed, *viz.* the detection of real usury; but if such proof is nevertheless allowed, every honest creditor in the nation is at the mercy of false witnesses; and that kind of proof, that cannot with any expectation of success be brought against a real usurer, who deals according to his profession darkly, may be made mischievously a mean, to defeat the best and most innocent



nocent securities. In short, such a mean of probation cannot with any probability be successful to discover frauds, and yet the allowing it, opens a door to frauds of the greatest nature, which our law has constantly guarded against; and as the possible advantages of it, in cases of real usury, bear no proportion to the probable and apparent disadvantages, that might reach the justest debts by it, it is submitted to the judges, whether it is fit by a decision in this matter, to expound the law so, as to subject all the deeds in the nation to the oaths of false witnesses, when, as the defender apprehends, no such thing, but rather the contrary results from the statute upon which this question arises. To conclude, it is of no import, what is alleged from the British act, 12th of Queen Anne, for that act determines nothing as to the method of probation; and if there is a greater latitude in the manner of proof in England than here, it will not follow, that we are tied down to their manner of proof; the pursuer might with the same reason plead, that this case as to the proof ought to be tried by a jury, because such is the custom in England: All the British statute can be alleged for, as to this question, is in so far as concerns the definition of the crime, what facts are comprehended under the law, and what not; for as to the manner of proof in the several parts of the united kingdom, for establishing the facts inferring the crime, that remains entire as formerly, to be prosecuted agreeably to the forms and genius of the law in each country.

“ The Lords found the libel probable by other habile witnesses, as  
“ well as the instrumentary witnesses.”

N° XLIV.

17th January 1724.

AGNES MUIRHEAD *contra* DAVID MUIRHEAD.

*One passing by an apparent Heir three Years in Possession, is liable to implement the apparent Heir's rational Deeds in his Contract of Marriage.*

THE Investitures of the estate of Drumpark, standing in favours of heirs-male, John Muirhead apparent heir of that estate, *anno* 1697, in his contract of marriage with Agnes Welsh, proceeding upon the narrative, that he was not infest, “ obliged himself to provide “ the lands, in case of no male children of the marriage, in favours “ of the female children, and to grant all writs and securities requisite “ thereanent.” John died uninfest, leaving a daughter, Agnes, only child of the marriage; whereupon David Muirhead, heir-male of the investiture, passing by John, was served heir to the last infest, and expedite a charter and infestment; against whom Agnes insisted in a declarator of her right by the said contract of marriage, upon the 24th act, *Parl.* 1695, her father, apparent heir, having been more than three years in possession.

It was pled for the defender, That the act of Parliament respects only onerous *debts* and *deeds*; to secure which only, was the act introduced: And as gratuitous alienations are not favourable, *in dubio* they will never be understood to be comprehended.

It



It was answered, That provisions and conveyances in contracts of marriage, are both favourable and onerous ; so far from gratuitous, that they tie up the husband from making gratuitous deeds in their prejudice : And the words of the act being general, *viz. debts and deeds*, since it is even a question, whether gratuitous debts and deeds should not be comprehended, there can be no doubt about rational deeds in contracts of marriage.

“ The Lords, in regard that John, though not infest, was three  
“ years in the possession of the estate, found the obligation in  
“ the contract of marriage binding on the heir-male.”

N<sup>o</sup> XLV.

24th January 1724.

Competition Mrs MARGARET LYON, with the CREDITORS of Easter-Ogle.

*Children found Creditors by their Father's Contract of Marriage, so as to compete with other onerous Creditors.*

**B**Y Contract of marriage, betwixt the deceased William Lyon younger of Easter-Ogle, and his wife, *anno* 1710, the land estate was provided to the heir-male of the marriage, and in failure thereof, to other heirs-male ; after which followed the clause, subject of the present debate : “ And if it shall happen that there shall be only  
“ daughters, and no heir-male of the said marriage ; then, and in  
“ that case, the said William Lyon younger binds and obliges him  
“ and his forefairs, thankfully to CONTENT, PAY and DELIVER to the  
“ daughter or daughters to be procreate of the said marriage, failzie-  
“ ing of an heir-male, as said is, the particular provisions and por-  
“ tions in manner, and upon the conditions after specified, *viz.* if  
“ there shall happen only one daughter, to pay to her the sum of  
“ 9000 merks ; if two daughters, 10,000 merks, &c.” Which provi-  
sions are payable at their respective marriages, if the same happen in  
their father's lifetime ; and if not married in his lifetime, at their re-  
spective ages of eighteen years complete, or the first term of *Whitsun-*  
*day* or *Martinmas* after his death, either of them last falling out : And  
execution is ordained to pass for implement of the contract, in name  
of persons therein specified : And there is a power of division of the  
above tochers reserved to the father. There having existed no heir-  
male of this marriage ; but the father being married a second time,  
and his affairs like to go into disorder, an adjudication was led a-  
gainst him at the instance of Mrs Margaret Lyon, who is now the on-  
ly daughter of the first marriage, with concurrence of the friends at  
whose sight execution was ordained to pass, for *security* of the sum  
contracted to be paid to her, the day of payment not being yet come :  
After which there arose a competition and ranking of the said Wil-  
liam Lyon's creditors, wherein Mrs Margaret compeared, and com-  
peted upon her interest.

Preference was pled for the creditors upon this *medium*, That this  
daughter of the marriage is truly to be considered as an heir of pro-  
vision, and as such liable to her father's creditors *in valorem*, after dis-  
cussing the heir of line and other representatives of the debtor. Nor



can it have influence in the case, that the provision here is conceived in form of an obligation to pay a definite sum: For the right of whatever heir of provision is built upon an obligation either to *dispose* or *pay*, or *provide and secure*; the form and style of the writ does not alter its nature; and since the obligations in such cases are still conceived in favours of persons *nascituri*, who in no sense can be creditors, they have always been interpreted to resolve in a provision of succession, which indeed the father cannot gratuitously disappoint, but yet must give place to his onerous creditors. To apply this to the case in hand; it cannot make a great alteration, whether these provisions become due after the father's death, or at a certain period of the children's age; which is in itself uncertain, and may eventually fall out before or after the father's death: The provision in either case is in the nature of the thing the same, *viz.* a settlement for children who exist only *in spe* at the time of the contract. To confirm this; no one doubts that the provision of lands to the heirs-male of a marriage by contract, is in the intention of parties as valid and solemn a stipulation, as the provision of sums of money to daughters or younger children; every body agrees nevertheless, that the onerous deeds and debts of the father are preferable to the provision made to the heir-male, and a burden upon it: Wherefore then should not the case be the same in regard to provisions of particular sums to younger children, since the intention of parties is the same in either case? And the necessity of the thing gives the father a full right of administration over the estate out of which the provision is made to the eldest son, as well as to the younger children. It is true enough, that in one sense younger children are considered in our law as creditors for the sums provided; and so frequently is the eldest also: But though they are creditors to one effect, *viz.* that the father is disabled from doing any gratuitous deed in their prejudice, it does not from thence follow, that they are creditors in all respects, and have equal privileges with extraneous creditors for onerous causes; since in reality the right favours more of the nature of succession, than of *jus crediti*, which necessarily supposes a plenary right of administration in the father. Hence in the question 16th June 1697, betwixt the children and creditors of Napier of Falside, the Lords upon report found, "That the obligation in favours of the children of the deceased Mr Robert Napier, in the contract of marriage, having been to an uncertain day, and conditional; the children or their assignees adjudgers upon the said contract, could not be heard to compete with the extraneous creditors, unless they proved that the father was solvent the time of his decease." And afterwards, upon a reclaiming bill, and hearing in presence, informations, and list of all the decisions which could be gathered prior to that time, the Lords found, "That provisions in contracts of marriage *liberis nascituris*, payable after the father's death, and the childrens attaining to such ages, less or more, and according as the children should exist more or fewer; albeit all these conditions should come to be fulfilled, and diligence should be used thereupon by the children, the children cannot be heard to compete, and come in *pari passu* with the onerous creditors:" Which was very consistent with another pronounced 24th January 1677, betwixt Graham and Rome.

On



On the other hand, it was pled for Mrs Margaret Lyon, If it is possible in a contract of marriage to contrive obligations by the husband in favours of younger children to be procreate of the marriage, whereby these children would become just and lawful creditors to their father, so as to compete with his other posterior creditors, it is certainly done in this case; for scarcely can obligations be contrived more express: Where obligations are conceived in form of provisions in favours of *heirs* of a marriage, there indeed the provisions are always affectable by the father's creditors, at whatever time the debts are contracted; the word *heirs* importing of itself a representation, subjecting *in valorem*; which, by the way, is the foundation of the decision Graham *contra* Rome. But the present contract of marriage is conceived in quite another form, and the parties here have carefully and anxiously distinguished betwixt the provisions in favours of those who were intended to be heirs, and the obligations in favours of the daughters and younger children: For besides the conveyance of the land estate, there is a separate clause of provision of 5000 merks in favours of the heir-male of the marriage, which deserves to be considered; there William Lyon younger, "obliges himself to "WARE and EMPLOY that sum upon land or annualrent, and to provide the same to himself in life, and to the heirs-male to be "procreate of the marriage in fee:" Which sum therefore would undoubtedly been affectable by his creditors. But the obligations in favours of the daughters and younger children are expressed in the strongest manner, to make them, not heirs of provision, but proper and true creditors; for there he does not oblige himself to WARE and EMPLOY, but to CONTENT, PAY and DELIVER to them their several sums, and at the several terms of payment therein mentioned. To strengthen this, let it be noticed, this daughter is not so much as apparent heir, there being a son alive of a second marriage; and her provision might have fallen due even during her father's life, when therefore he would not have had an heir: And if she outlive the term of payment, her provision upon her death, will fall to her nearest of kin, and be affectable by her creditors, even though her father were alive. All which are incompatible with the nature of a right of succession: For if the children were to be accounted heirs of provision, the succession could not devolve upon them, but by the death of him to whom they were heirs; and should they decess before him, the subject could never descend to their representatives as such, or be affected by their creditors; but either the provision would be wholly evacuated, or devolve upon the next heir of the fiar. It is no solid difficulty, that the obligations are conceived *liberis nascituris*: The question comes just to this, whether an obligation to a person not yet existing, but to be procreate, can be valid and effectual? or if it be void and null? for if the obligation is good for any thing, it must, upon the existence of the person in whose favours it is conceived, be effectual to compete with other creditors, according to the diligence done upon it; and in that view, it is presumed it cannot well be made a question. Had this obligation been granted in favours of children to be procreate by any other person than the grantor, who can doubt of the validity thereof? what difference does it make in law, that it is in favours of the grantor's own children, since these



these children were not by the obligation to represent him, or to be heirs of provision? there can therefore remain no doubt, but this obligation in the contract of marriage was binding and valid from the beginning; and that the daughter who was born very soon thereafter, and before contracting any of the competing debts, was thereby from the time of her birth, a just and lawful creditor for the sums payable to her by the contract, as much as if a bond of provision had at that time been granted to her *nominatim*, and duly delivered; and consequently there does not appear any ground in law, whereupon these obligations can be reduced by subsequent creditors, or they preferred to her, otherwise than according to the priority of their respective diligences. It remains but to notice some decisions, to show this plea is not without precedent: Sir Alexander Hamilton of Hags, in his first contract of marriage, bound himself to provide the sum of 24,000 merks to the daughters of the marriage, payable at their respective ages of sixteen years: The Lords, 21st February 1690, “ Fand  
 “ by the conception of the foresaid contract of marriage, the daugh-  
 “ ters are not heirs of provision, nor is the provision thereby con-  
 “ ceived in their favours a simple destination of succession; but fand  
 “ by the contract, the daughters are formally stated creditors to  
 “ their father; and therefore repelled the grounds of preference pro-  
 “ posed for the posterior creditors, and preferred the children ac-  
 “ cording to their diligence, the same having been raised in the chil-  
 “ drens own name, against the father, in his lifetime, after the elap-  
 “ sing of their respective terms of payment.” Another decision is as follows: Sir Robert Preston, in his contract of marriage with his second wife, obliged himself to pay 20,000 merks to the heirs and bairns of the marriage, at their age of fifteen years, and to infest them in lands for security, &c. In a competition of these children with their father’s onerous creditors, the Lords, 15th July 1691, “ Found that  
 “ the children of Preston, by their father and mother’s contract of  
 “ marriage, were only heirs *designativè*, and not heirs substitute, but  
 “ real and formal creditors for the sums therein contained.”  
 “ The Lords found the creditors not preferable, but that the  
 “ daughter must come in *pari passu* with them, according to their  
 “ several diligences.”

N° XLVI.

21st February 1724.

REPRESENTATIVES of Lord Bowhill *contra* the CREDITORS of Gala.*Action against an Heir to execute a Trust.*

THE affairs of the late Sir James Scot of Gala falling into disorder, it was thought convenient to take out a gift of his single and liferent-escheat in name of Lord Bowhill, one of his creditors; which gift, besides the debt in the horning whereupon it did proceed, was burdened with a considerable annuity for the maintenance of Sir James and his family, and likewise with the donatar’s own debt; and as to the residue, backbond was granted in Exchequer in the usual way, for the behoof of the other creditors. After the Lord Bowhill’s death,



death, which happened *anno* 1714, his representatives insisted in a process of exoneration, as to this right of trust; concluding, "That it should be found and declared, that the said donatar and his representatives were only accountable for what accrued from the gift during the donatar's life:" And this, notwithstanding that Sir James the rebel did many years outlive the donatar; and that the gift was to the donatar, his heirs and assignees; and that it was a proper trust granted for the behoof of others, as well as the donatar himself.

It was contended for the creditors, That this gift of escheat was by no means to be considered as a *personal* mandate, or trust of such kind as to end with the mandatar, where the integrity and sufficiency of the mandatar is the principal thing in view: Here it was of no import to the creditors in whose person the right did subsist; it was enough to them if the donatar, or such who came in his place, were responfal. This right is a plain conveyance from the crown to the creditors and others, converted into one man's person for the behoof of all; which was a necessary expedient for the better executing the right: And no body can doubt in the case of any conveyance to a person, his heirs and assignees, of a common subject for the utility of all concerned; but that such conveyance being once accepted, must remain a charge upon the acceptor, his heirs and representatives, till the ends and uses for which the same was granted be fully accomplished. *2do*, Admitting that the donatar could have relieved himself of the burden of executing the gift; that could only be done by a due notification to the creditors, while matters were yet entire: But it is submitted if this can now be done, after the profits of the said liferent-escheat have perished, or been diverted to other purposes. The pursuers neglecting the proper notification to the creditors, the creditors rested satisfied, that they were going on to perfect the work begun by their predecessor; they trusted to this, and most justly: The pursuers had their choice to prosecute the administration of the gift, or to notify to the creditors their refusal; and if neglectful, they forbore both, they alone can suffer by their neglect.

It was granted by the pursuers, That the gift of escheat was a mandate; but then it appears by the tenor of the backbond, it was only *in rem suam*, or at most for such, with whose debts the gift was expressly burdened; but as to the creditors at large, whom the donatar neither did, nor was presumed to know, the donatar's representatives opposed the tenor of the backbond; which says, "That the further benefit shall be converted and applied to the utility and behoof of the remanent creditors, at the sight of the Lords of Treasury," which will never infer either trust or mandate betwixt the donatar and the creditors; he is not even taken bound at the instance of the Treasury to administer, the clause importing merely, "That the donatar should have no right to more of the escheat-goods, than to satisfy the debts in the gift; and therefore, in case of his intromission with more, that he should be accountable to the Treasury." The creditors might have applied for, and prosecute a new gift of escheat, which would be a title of immediate intromission against the debtors, the preferable debts in the first gift being once satisfied; and even against the first donatar, if he had extended his intromissions beyond his title: But no action could be competent against the donatar



tar himself, and far less now against his representatives, to compel them to continue their intromission beyond their own interest. Answered to the *second*, Since there is no title, there is no presumption that the donatar or his representatives would continue their intromission farther than in satisfaction of their gift: The creditors then had no reason to trust to this; and if they neglected to take out a second gift, the pursuers have their own argument to retort against them, That they alone ought to suffer thereby.

“ The Lords found the representatives not liable in diligence.”

Nº XLVII.

26th February 1724.

JAMES WILLISON *contra* CALLENDAR of Dorater.

*Tailzies good against Heirs, without Registration.*

**C**ALLENDAR of Dorater tailzied his estate, with clauses irritant and resolute, in favours of Ludovick Willison, *alias* Callendar, the present Dorater, and the heirs-male of his body; and failing of him, to James Willison his brother; with several other substitutions. The said Ludovick Willison, *alias* Callendar, of Dorater, having contracted debts contrary to the tenor of his right, James Willison the substitute pursued a declarator of irritancy: Against which this defence was made, That the tailzie not being registered in terms of the act 1685, the same could not be allowed, and was ineffectual to prejudge either Dorater or his creditors.

To make good this defence, it was pled, That this act 1685 anent tailzies, is an entire new constitution, settling the rules that govern the whole subject of tailzies; and therefore derogates from all former practice in this matter: But so it is, that the act gives allowance or authority only to such tailzies as are authorized by the Lords, and recorded; consequently without that, tailzies can have no manner of effect, and so can neither be good against heirs or creditors, these being the two classes with respect to which the act statutes equally.

It was answered, That the act 1685 is no new *correctory* law, abolishing every former practice anent tailzies; it is plainly a *declaratory* law, not restricting the former power of making tailzies; introducing indeed some things new for the security of creditors, but leaving the heirs entirely to that footing they are placed upon by the tailzie. Hence the receiver of a disposition containing strict prohibitory and irritant clauses, if he contravene the *condition* of his own right, must fall from the same, as the disponent has appointed, this new act notwithstanding; for though the creditor may, the heir can never object, that the tailzie is void because not registered: And truly, without the most express words, one should never imagine, that in a question with the disponent himself, the registration of the right by which he possesses, can have any influence upon the nature of it; and the words insinuate rather the contrary: “ And being so insert, his Majesty, with advice and consent aforesaid, declares the same to be “ real and effectual, not only against the contraveners and their “ heirs,” (which manner of expression plainly insinuates, that so far the



the matter is taken for granted, and supposed from the nature of the thing; and then follows) "but also against their creditors, appraisers, or other singular successors:" Which last was the only intentment of the statute. It continues therefore a principle, and probably will to the end of the world, "That any *quality* in his own right, must necessarily affect the possessor."

"The Lords found the tailzie binding upon the institute who had accepted the same, though not registered."

N<sup>o</sup> XLVIII.

26th February 1724.

Competition Mr WALTER STIRLING, &c. with the ANNUALRENTERS upon the Estate of Ballagan.

*Adjudication with a Charge excludes not a posterior Infeftment of Annualrent.*

**I**N the ranking of the creditors of Ballagan, a competition arose betwixt the annualrenters and adjudgers; whereof the case was, that the heritable bonds, and writs in favours of the annualrenters, were prior to any step of diligence upon the adjudications; but the infeftments thereupon were posterior to the adjudications and charge against the superior; and the adjudgers were never infeft.

For the adjudgers it was pled, That by act 62. 1661, confirmed by constant custom, an adjudication with a charge is equal to adjudication with infeftment; which must prefer it to all posterior infeftments. And there is good ground it should be so: For if a charge against the superior is the last step the law directs to be taken during the legal, superseding the necessity of infeftment till after expiration thereof, the charge ought to be considered as an absolute security during that time; otherwise every adjudger would be under a necessity of taking immediate infeftment, to his own great inconvenience, and the utter ruin of the debtor.

It was answered, That these charges against the superior tend only to regulate the competitions of adjudications one with another, but were never designed to give a preference in competition with voluntary rights; as was expressly found, 10th March 1683, decis. 58. of Falconer. For an adjudication with a charge, is not so much as a real right to require a special service; how can it then compete with an infeftment?

"The Lords found, That the heritable bonds and writs in favours  
"of the annualrenters and infefters, being prior to the adjudications; the infeftments on the rights of annualrent, though  
"posterior to the adjudication and charge thereon, are preferable to the said adjudications."

It was likewise pled in favours of the annualrenters, That the charge against the superior, at the adjudgers instance, was execute against an apparent heir not infeft, who could grant no infeftment; and consequently the charge was null. But the Lords took it up upon the abstract point, and determined accordingly.

N<sup>o</sup> XLIX.



N° XLIX.

4th July 1724.

Mrs JANET SCOT *contra* Sir ALEXANDER BURNET of Leyes.*Creditors of an Heir entered cum beneficio inventarii, are preferred according to their Diligence.*

SIR ALEXANDER BURNET having entered heir *cum beneficio inventarii*, sold part of the inventoried estate to Mr Fergusson of Pitfour; in whose hands, as debtor for the price, an arrestment was laid by Mrs Janet Scot, one of the defunct Sir Thomas Burnet's creditors, and who had obtained a decret of constitution against the present Sir Alexander. She having thereupon insisted in a process of forthcoming, the defence offered for Sir Alexander Burnet was, "That he being heir entered *cum beneficio inventarii*, was liable to the creditors in the value only of the inventory; and the inventory not being sufficient to answer all the defunct's debts, the arrester could only draw her share proportionally with the other creditors."

In support of which it was argued, That the value of the respective debts must be calculated at the time of the heir's entering by inventory; if there be not sufficient fund for all, the several claims are so far *ipso jure* diminished, at least in so far as they relate to the heir, who by the law is protected from being further liable than to a limited extent; whence it was urged, that no diligence however in its nature preferable, could support a claim beyond that proportion of the inventory, which would fall to the user of the diligence, upon a just division amongst all the creditors. In consequence of this it was thought, that if an adjudication were leading against an heir who has entered *cum beneficio inventarii*, it would be competent to stop the adjudication, if the heir should offer payment of the debt in proportion with the other creditors; at least there behoved to be a reservation *contra executionem* in the decret of adjudication: And so in *executione*, *i. e.* in the division of the estate, the adjudger would only draw his share of the inventory, in proportion with the other creditors. *2do*, It was contended, That arrestment in this case is not a habile diligence, more than in executry: The law is express, "That the heir shall have access to enter to his predecessor *cum beneficio inventarii*, as use is in executry and moveables;" and it is certain, that no diligence by arrestment, whether of the subject of the testament, or of the executor's proper effects, can any way afford a preference, or make that debt, which in prosecution against the executor, in concurrence with the other creditors, would have been but half or third, extend in the forthcoming to the whole debt. *3tio*, If creditors in this case were to be preferred according to diligence, it would give occasion to much fraud; for the heir would have it in his power to prefer the creditors as he thought fit, by discovering the effects to some, and concealing them from others; and by giving timely notice in order to use the first diligence, and a thousand artifices of that kind.

To the *first* it was answered, That the act of Parliament introducing the benefit of inventory in heritage, does not tie up the hands of



of creditors from doing diligence, more than where the heir enters without inventory: The act is likewise very far from diminishing the claims of the creditors *ipso jure*; these stand equally good against the heir, as against the predecessor; in proof of which, if neglecting or overlooking this privilege, the heir pay to any creditor his whole debt, though it may be far enough above the inventory, he will have no *condictio indebiti*; which yet is always competent where one pays more than he owes. This act therefore does not *affect* or *limit* the rights of the creditors, but gives only a *privilege* or *benefit* to the heir, which, like other privileges, may be used or not at pleasure; and it is only competent, after he has once made the value of the inventory forthcoming to the creditors, to protect him from being further liable; wherefore it is, that the defence should not be competent, as long as the heir has any share of the inventory still remaining with him, which he has not accounted for: And taking the matter in this view, it is evident that an heir *cum beneficio inventarii*, has no relevant defence against an adjudger, unless he can say, that the whole subject inventoried, or which is the same, its value is already applied to the payment of lawful creditors, who being before-hand with the adjudger in their diligence, have got payment, or at least established a *nexus realis* upon the subject, whereby the inventory is entirely exhausted. To apply which to the case in hand, since here is a part of the inventory not yet accounted for, *sciz.* the price of the land in Pitfour's hand, in which Mrs Janet Scot, one of the creditors, has established to herself a preference by arrestment; this part of the inventory must be made forthcoming to her, even suppose the question were with the other creditors, since she would have the first arrestment; much more when the question is with the heir, who has not the smallest title to make objections, as long as any share of the inventory remains unexhausted. To the *second*, answered, The defender will not profit himself by running a parallel betwixt an heir *cum beneficio*, and an executor; for it is certain, that in actions against the executor, one creditor may get the better of another, by the forwardness of his diligence: It is true that the executry cannot be arrested, but the reason of that is, because an executor is a common *trustee* for the benefit of all having claims upon the subject of executry, obliged to administer and do diligence for that end, but not *personally* liable to the creditors for their debts; whereas an heir *cum beneficio* is not a *trustee*, but a proper *debtor*, as much as where there is no inventory; with this only difference, that after he has made just count and reckoning to his predecessor's creditors, of all that belonged to his predecessor, the law *in favorem* has given him, as it were, a *personal protection* to be no further liable; but in the mean time, he is liable to all manner of execution, real and personal, horning, adjudication, arrestment, &c. which an executor is not, till he be personally decerned, as not being *debtor*, but *trustee*: Indeed after he is personally decerned upon the only *medium* competent against an executor, *viz.* his intromissions with the executry, that decret may be put to execution in every shape against him and his goods; so that this argument is entirely inconclusive. Answered to the *third*, As to this matter, the creditors are in no worse situation with respect to the heir of their debtor, than they are with respect to the debtor him-



self; every man has it in his power more or less to favour particular creditors; and a creditor has no legal objection that he is not the favourite: Indeed if he can allege fraud; if he can say, that by the collusion or deceit of the debtor, his co-creditor obtained the first diligence, this will be relevant; and this is all the safeguard any creditor can have from the nature of the thing, against the partial favour his debtor may bear to a co-creditor.

“ The Lords found, that in this case the creditors are preferable,  
“ according to the diligence done on their respective debts.”

N<sup>o</sup> L.

10th July 1724.

JAMES DOUGLAS, eldest lawful Son to the deceased John Douglas of Tilliwhillie, *contra* JOHN DOUGLAS the second Son.

*In a Contract of Marriage, the Estate being provided to the Heir of the Marriage; if in any Case the Father can pass by the Heir, and give the Estate to another Son of the Marriage?*

JAMES DOUGLAS of Inchmarlo, in his son John Douglas his contract of marriage, settled the lands of Inchmarlo “ upon him and wife “ in conjunct fee and liferent, and to the heirs-male to be procreate “ of the marriage.” Of this marriage were two sons, James and John, the parties in this debate; the eldest of whom, James, for his weakness and folly, was neglected by his father; who, notwithstanding the provision in his contract of marriage to heirs-male, settled the estate upon John, second son of the same marriage. Of this settlement James raised reduction, after the father’s decease, upon this *medium*, That it was *ultra vires* of his father to alter the settlement made in his favours, contracts of marriage being so far onerous, that they cannot be gratuitously disappointed; especially here, where the estate came from the grandfather, and was not the father’s *ab ante*.

To which it was answered, That the import of such provisions to the heir-male of a marriage, does not limit the succession to the eldest, more than any other son of the marriage; being only intended to provide against fraudulent and gratuitous dispositions in favours of children of another marriage: So that the contract settling the succession to the heirs-male of a marriage is duly implemented, when the father disposes the estate to any of the sons he thinks best deserving. The reason is, that contracts of marriage, though onerous as to the wife’s interest, are noway onerous as to the children: So that though her interest will exclude gratuitous alienations in defraud of her children, it will never weigh in favours of one son more than another; the legal presumption being, That they are all equally in her favours. But whatever may be in the general point, the decision must go for the defender, upon this *medium*, That if it should be allowed the father cannot do merely gratuitous and arbitrary deeds, which might be interpreted in defraud of the marriage-settlement, no body denies a power of doing rational deeds; whence he has a power of providing a second wife and children, and must have a discretionary power of settling the estate upon a second son, where the  
eldest



eldest is undeserving: And in this case, there is sufficient evidence that the pursuer is a weak, foolish, extravagant person.

“ The Lords found, That in this circumstantiate case, the father  
“ might dispose of the estate to either of the sons of the same  
“ marriage; and therefore assilzied from the reduction.”

N<sup>o</sup> LI.

22d July 1724.

WILLIAM DOUGLAS *contra* ROBERT DOUGLAS and EDWARD DRUMMOND, Portioners of Inveresk.

*The Effect of an Obligation in a Contract of Marriage, conceived in favour of Children nascituri, and prestable within a limited Time.*

**R**OBERT DOUGLAS, by contract of marriage with Helen Gourly, became bound “ to infest himself in certain lands and tenements about Inveresk, and that betwixt and a precise day, about a year after the marriage; and being so infest, immediately thereafter to resign for new infestment to his future spouse in liferent, and the heirs of the marriage in fee; which failing, his own nearest lawful heirs and assignees whatsoever; with reservation of his own liferent.” Inhibition being raised upon this contract, William Douglas, a son of the marriage, insisted in an action against the father, to denude; and in that process Edward Drummond having appeared, and produced a disposition for onerous causes, did contend, That the father, by the conception of the contract of marriage, was agreeable to the intention of the marriage-articles still to remain fiar; and consequently could alienate for onerous causes. It was pled accordingly, That nothing is better established in our law by decisions, than that a fee in favours of children to be procreate of the marriage does resolve only in a substitution: So it was found in the case of Muir of Anniston; where a bond being disposed to a husband and wife in liferent, and to the children in fee, the father was found to be fiar, and the children only substitutes. And in the case of Thomsons *contra* Lawsons, 4th February 1681, where certain tenements were made over to a husband and wife in a contract of marriage in liferent, and to the heirs of the marriage, &c. the Lords found, “ That by the conception of the disposition, notwithstanding of a liferent mentioned to the husband, yet he was really fiar.” To which may be added, the authority of Sir James Stewart, in his answers to *Dirleton's Doubts*, tit. *Fee*. And the reason of this is plainly, that the fee cannot be *in pendent*, cannot hang in the air; therefore must be in the father, since it cannot be in the children before they are born. Now, beside this argument from the necessity of the thing, it will be easy to make it appear, that such was the design of the parties that the father should be fiar. In the *first* place, The obligation is in favours of *heirs*, which necessarily imports a succession; and though in some special cases they are to be understood *designative*, here the substitution to those heirs of the marriage demonstrates, that nothing but a *succession* was intended in favours of the issue of the marriage. To clear which, let the case be put, that the issue of the marriage



marriage should fail in the father's lifetime, and the nearest lawful heir set up the same claim, and serve an inhibition; his plea, by the conception of the contract, would be as strong as the present pursuer's: For the father is bound to him, failing heirs of the marriage, in the precise same words and manner that he is bound to this pursuer. Now, seeing there would be no pretence of denuding in the father's lifetime in the one case, there can be as little in the other.

To which it was answered, It is very true, that in actual settlements, whether with respect to lands or money, taken to a husband and wife in liferent, and to the children in fee; the husband is fiar, because the fee cannot be pendent, and cannot be in the children during their non-existence: But that is altogether out of the present case, which is founded upon an express obligation of the father, to denude himself of the fee within a time limited, in favours of his children; with a reservation only of his liferent; and it has always been reckoned a distinguishing mark betwixt a provision of succession, and a direct obligation, that a precise day has been fixed for implement, as was found particularly in the case of the creditors of Easter Ogle. Nor is there any thing in the observation, that the heirs of the marriage and their substitutes are provided for in the same clause and form of words; for the presumption runs as strongly in favours of the children, whose security is principally in view in contracts of marriage, as it runs against the other persons named, for whom it would need the most express words, before it could be imagined, that they were mentioned in the contract for any other end than to carry out a destination of succession.

Replied for the defenders, There appears to be very little in this distinction: For the obligation to invest the children in fee, can never be more effectual or stronger, than if the father had actually implemented the obligation, by taking the liferent in favours of himself, and the fee for the children *nascituri*; now as this would have only imported a destination of succession to the children, the obligation to invest, fixed to a certain day, before any child could well exist of the marriage, can never go further.

Duplied, The father's taking the liferent in favours of himself, and the fee to the children *nascituri*, would be no implement of the obligation in this contract of marriage, unless he renewed the investment to them *nominatim* after their existence; for such is the import of the obligation: And it would appear, that in putting off performance of the obligation for a twelvemonth, the parties had expressly in view, that investment should be taken in name of the heir of the marriage, if any was then in being: And this quadrates with its being an obligation in the strictest sense. Had indeed such an obligation been framed prestable three or six months after the marriage, it would have been a plausible argument, that since there was no possibility of implementing it in any precise meaning of the words, therefore it should be interpreted as a succession; *quia verba sumenda sunt cum effectu*: But where clauses bear a fair and literal meaning, there is no place for forced interpretation. Here there was a distinct conditional obligation, to be implemented at the distance of a twelvemonth, to the children of the marriage, providing any were at that time, and if none, at any time thereafter upon their existence: The obligation



ment is now purified in the person of this pursuer, which ties down absolutely the father; and seeing it is fenced and secured by the inhibition, ties down also the purchaser.

“ The Lords found, by the clause in the contract of marriage, the  
 “ father being obliged after his own right was completed, to in-  
 “ fest the heirs of the marriage in fee, as soon as they exist,  
 “ that he could not grant any voluntary right in prejudice of  
 “ these provisions; and therefore, that the inhibition is effectual  
 “ against the disposition in question.”

N° LII.

8th December 1724.

Competition JAMES WILLISON, with the CREDITORS of Dorater.

*A Tailzie not recorded, has no Effect against Creditors.*

**I**N the ranking and sale of the estate of Dorater above mentioned, this question occurred, “ Whether or not a tailzie, with irritant clauses in the procuratories and precepts, but not recorded in terms of the act 1685, does void the creditors rights ?

For the creditors, was urged the express tenor of the act, appointing a register for tailzies, and ordaining tailzies to be insert therein; subjoining, “ And being so insert, his Majesty, &c. declares the same to be real and effectual, not only against the contraveners, but also against their creditors, and other singular successors whatsoever, whether by legal or conventional titles ;” whereby it is with certainty inferred *à contrario sensu*, if tailzies are not insert, the law does not militate, and creditors are safe; and truly was it otherwise, no reason could be given why such a register should have been appointed.

For James Willison it was contended, This act can never be understood as entirely setting aside what was always looked upon as an established principle in our law, namely, That wherever one by diligence affects a *qualified* right, especially when at the same time that he sees the right, he must see the *quality*, he can only carry that right with the *quality* that affects it. Upon examination of the following part of the law, this will appear to be far from the intention of the Legislature, in so far as there follows a certification in the law, “ That if the said provisions and irritant clauses shall not be repeated in the rights and conveyances, the same shall not militate against the creditors or other singular successors, who shall happen to contract *bonâ fide* with the person who stood inest in the estate, without the said clauses in the body of his right :” But there is no manner of certification upon neglecting to register. From which an observation or two does naturally arise : 1<sup>mo</sup>, That it was the inserting the clauses in the inestments and conveyances, the law considered as the proper notification to the persons who were to contract with the heir; and therefore it is, that the omission thereof should put creditors or purchasers in safety to contract, by no means the omission of registration : It cannot be otherwise accounted for, that a certification is adjoined to the one provision, and none to the other; and the com-



mon rule will here apply, *Casus omiffus habetur pro omiffio*. And surely, if the reason of the thing be confidered, one fhall be at a lofs to find any tolerable colour why a tailzie, becaufe not registered, fhall have no effect againft a creditor, who at the fame time has all the certification his heart can require, of his hazard in contracting with an heir of tailzie, from the heir's own rights in the ordinary record. *2do*, The Lords have already found this tailzie good againft the heir, though not registered: But for what reason? Not furely upon any thing in the ftatute literally taken: For, if according to the fense put upon it by the creditors, the tailzie is not to be allowed, or in other words, is to be no tailzie, if not registered; then it muft be a fimple fee even *quoad* the heir. But the Lords found fo from the nature of the right; from which, as it can now be argued upon as law, this confequence follows, that the ftatute is not the fole and only governing rule in matter of tailzies: It leaves us ftill to be guided by maxims drawn from the nature of things, and our former eftablifhed law; which ftill regulates the heir, and muft regulate thofe deriving right from him, when they have not the *bona fides* of a purchafer to plead, or any invincible ignorance of the quality that affected the right: But at the fame time, that they fee the right on the faith of which they pretend to have contracted, they fee it affected with a quality; and therefore cannot, in the nature of the thing, carry it free of that quality, or plead a *bona fides* to excecme them from it.

Replied for the creditors to the *first*, The certification is not adjected to the claufe touching the omiffion of registration, for a good reason, becaufe it has no relation to it, being calculated to oblige every heir of tailzie to repeat the claufes irritant and refolutive in his rights, in order that every heir's infeftment might be qualified by thefe claufes: But it never was defigned that every heir fhould register the tailzie, one registration being fufficient for all. To the *second*, No argument can be drawn from heirs to creditors in this matter: A tailzie unregistered is good againft the heirs, becaufe every perfon is obliged to notice and know the qualities of his own right; which is no way contrary to the act 1685, ordaining tailzies to be registered, becaufe that claufe of the act, like all other claufes of publication, was intended with a view only to creditors, and with no manner of view to heirs. Nor will it follow, that an unregistered tailzie ought alfo to be good againft creditors who have a fufficient intimation otherwife of the tailzie, fince it is expreffed in the infeftments: For if the law hath thought proper, for the more fecurity of creditors, to order a publication both ways, creditors have good reason to infift upon their privilege; and though one of them might be thought fufficient fecurity, there is no harm done in commanding both: Multitude of the law breaks not the law.

“ The Lords found, That the tailzie not being registered in terms  
“ of the act of Parliament, cannot prejudge the creditors.”



N° LIII.

12th January 1725.

WILLIAM MACKAY, and ELSPETH his Wife, *contra* THOMAS ROBERTSON.*A Bond secluding Executors cannot be disposed of upon Death-bed.*

**T**HOMAS ROBERTSON, merchant in Inverness, became debtor in a bond for 3000 merks, to William Macwirrich and his heirs, *secluding executors*. John Macwirrich, only son to the said William, made up a title to the bond, by serving heir in general to his father; and thereupon charged Robertson the debtor; who suspended: Thereafter upon death-bed he conveyed this bond by a testamentary deed in favours of his mother, and William Mackay her husband, the present pursuers; who being confirmed executors to the defunct, insisted against the debtor Robertson for discussing the suspension. It was objected, "That the pursuers had no sufficient active title by their confirmation as executors, the bond charged on being heritable, *secluding executors*." To enforce which, it was pled, *1mo*, That formerly all bonds bearing annualrent were heritable, whether in the person of the original creditor, or of his heirs; and could only be transmitted by a service. The *act* 32. *Parl.* 1661, declares all bonds bearing annualrent moveable, except in these cases following, *viz.* "That they bear an express obligation to infest, or that they be conceived in favours of heirs and assignees, *secluding executors*; in either of which cases, ordains the sums to be heritable, and to pertain to the heir." Here there is a general alteration of our ancient law with respect to bonds bearing annualrent, with an exception from that alteration; so that in the cases excepted, the former law continues in its full vigour, as if no such alteration had been made: And therefore it clearly follows, that bonds *secluding executors* are simply heritable, without regard in whose person they exist, equally as bonds with clauses of infestment. *2do*, In this bond there is a destination of succession, *sciz.* to the creditor's heirs, *secluding his executors*; for it is not conceived to the creditor and his *heir*, but to the creditor and his *heirs*: And therefore, till this destination be altered in a legal way, the bond for ever must descend from one heir to another, because *haeres haeredis mei, est haeres meus*. But this alteration could not be made upon death-bed, or by way of testament; in both which views the pursuers, as executors confirmed to the defunct, can have no right to this bond.

Answered to the *first*, A bond *secluding executors*, though it go to the heir, not to the executor, is not for that reason in its nature heritable: For these questions are perfectly distinct, "What rights are in themselves heritable and moveable? And what go to heirs in opposition to executors?" This last is a *questio voluntatis*: The other independent of any man's will; for though a proprietor has it in his power to make his rights descend from him in any channel he pleases, he has no power to alter the legal essence and nature of them. Thus then, as bonds bearing annualrent are made simply moveable after the *act* 1661, they cease not to be so, though having clauses *secluding executors*;



executors; and when the act mentions bonds secluding executors as an exception, it is not with an intention to continue them simply in their *nature* heritable, but only to make them pass to the heir, according to the *destination* of the creditor. Hence it is that a bond secluding executors, though it would go to the creditor's heir by virtue of that clause; yet if the creditor assign the bond, it goes to the assignee's executor by virtue of the legal succession, unless the contrary be expressed; which is a demonstration, that it is in its *nature*, and by the law, moveable: For did it continue heritable, as before the act, it would infallibly go to the assignee's heir, as bonds bearing annualrent did before that time. To the *second*, answered, That this bond was indeed heritable in the person of the first creditor *destinatione*; but having devolved into the person of a successor by service, it became moveable, so as to fall to the heir's executors. The reason is, that when a moveable sum, contrary to its nature, is made *destinatione* heritable, that destination not being intended as a continued tailzie to heirs, but only a provision for the *first heir* of the creditor; the destination coming to be satisfied by an heir once existing, the sum thereafter returns to its proper nature of a moveable subject. But granting even such a destination to heirs, as is contended for, the pursuers title falls notwithstanding to be sustained; for where a subject in *itself* moveable, the case of bonds bearing annualrent, comes to be tailzied to heirs, it ceases not to be moveable in its nature, and therefore capable to be disposed of in *testament*, and upon *death-bed*. Thus a bond granted to a creditor, "which failing, to Titius; " which failing, to Mævius," &c. will as effectually exclude the executors, as a bond *expressly* excluding them; and the right too must be made up in the person of the substitutes by a service: And yet the creditor, or any of the substitutes, may dispose of such bond by way of testament. Neither is it in law considered as any other way heritable, but as to the form of establishing the title; and why it ought not to be so likewise in bonds secluding executors, when once come in the person of the successor, no solid reason can be given: For as Sir James Stewart observes, *voce* Bond heritable, p. 17. *versus finem*, "There is a great difference betwixt HERITABLE and MOVEABLE, " and TESTIBLE and INTESIBLE; and some subjects may befall to the " heir, and be carried too by service, and yet the creditor or the " substitute may rest upon the same."

Replied for the defender, Were it even true, which will not be allowed, that bonds secluding executors, are in their nature moveable, and consequently conveyable by testament; the pursuers will still be cut off by the law of death-bed: For if any moveable subject by a tailzie be appointed to go to heirs, the proprietor upon death-bed, has no more power over this moveable subject, than if heritable; because in no case can a man prejudice his heir upon death-bed: And this the pursuers will never get over. See February 1722, Maxwell *contra* Neilson of Barncailly.

"The Lords sustained the objection."



N<sup>o</sup> LIV.

14th January 1725.

Sir JAMES HALL of Dunblaw *contra* JOHN CRAW.*Recognition.*

**I**N the declarator of recognition of ward-lands, at the instance of Sir James Hall of Dunblaw *contra* John Craw, the dispute came to this, "If a wife's alienating her ward-lands to her husband, his heirs and assignees whatsoever, *nomine dotis*, does infer recognition?"

And it was pled for the defender, That such alienations did not infer recognition by the feudal law, and consequently not by our custom, which has received the feudal law; and the feudal law must be reckoned ours, in every case where it cannot be shown we have expressly receded from it. The reasons are, *First*, The favour of marriage. *2dly*, That the heiress-vassal is presumed to marry with consent of the superior: The heirs of the marriage are *alioqui successuri*, who are heirs to the husband; and he himself, to whom the infeftment is granted, cannot in the eye of the law be accounted a stranger.

Answered for the pursuer, This defence is plainly inconsistent with the nature of ward-holdings; for it is a *condition* and *quality* in every such right, "That the vassal shall not alienate the fee without the superior's consent." Now the fact is, that the vassal has truly alienated the fee, and that in the most absolute manner, "to her husband, his heirs and assignees;" whence the alienation is null, and the lands return to the superior, from whom they were derived under that *condition* and *quality*: So that truly a declarator of recognition differs little from a common declarator of *irritancy*. It has no influence, that the alienation is made to the husband: For this is as effectually altering the line of succession appointed by the superior, as if made to any other whatever; and *de facto* the defender, who served heir to his father the husband in these ward-lands, is of another marriage. As for the feudal law; whatever influence it has amongst us, is by way of advice, not authority; and if there is solid reason on the other side, as in the present case, that will be followed.

"The Lords found, That a wife in her contract of marriage disposing ward-lands to her husband and his heirs, infeftment being taken thereon, infers recognition."

N<sup>o</sup> LV.

January 1725.

JAMES LESLY *contra* Sir JAMES NICHOLSON.*Bills found moveable quoad Fiscum et Relictam.*

**J**AMES LESLY having right to a bill accepted by Sir James Nicholson's lady before the marriage, Sir James obtained suspension thereof, upon the following ground, That bills due to a wife, and whereof the term of payment was come and bygone before the marriage,

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riage,



riage, did not belong to the husband *jure mariti*, and for that reason, bills due by her ought not to affect him; and in order to prove, that such bills did not fall under the *jus mariti* or *relictæ*, he insisted upon the act 1681, by which bills bear annualrent, and thereby become heritable *quoad fiscum et relictam*, in consequence of the 32d act 1661. To this it was answered for the charger, that the act 1661 did statute only, "That all contracts and obligations for sums of money, containing clauses for payment of annualrent and profit, should be heritable as to the *jus mariti* and *relictæ*;" wherefore where sums bear annualrent not *ex pacto*, by a clause contained in the obligation, but *ex lege*, and in consequence of a statute, they were not declared heritable, and therefore belong to the husband; and in the present case, the bill containing no clause for payment of annualrent or profit, no argument can be drawn from the said act 1661. In fortification of which distinction it was contended, that even before the act 1661, sums bearing annualrent *ex lege*, went to the fisk and relict, and consequently no less since, that act leaving the respective interests of the fisk and relict in the precise circumstances they were before; and that from the following considerations. *First*, The reason why bonds bearing clauses of annualrent, were reckoned heritable, and not moveable, was, because before the reformation, annualrents were constitute by infeftment only, to prevent the objection of usury; arising from the canon law; and in regard the provision of annualrent, though the obligation was personal, to pay it yearly and termly, without mention of infeftment, resembled those annualrent-rights, which formerly belonged to the heir, therefore the succession to them was regulated in the same manner, as they had been so constituted: So that indeed the reason of their descending to the heir, was not that profit arose upon the sum, which would have been as forcible as to money employed in trade or exchange; but because of the express stipulation of yearly annualrents, which made it a *feodum pecunie*, and precisely the same thing with annualrents constitute by infeftment, differing only in the security, the one being real, the other personal. *2do*, This distinction is made out from examples, as follow: Sums in a decret did before the act, and do still fall to the executor, without exclusion of the *jus relictæ*; and that albeit the creditor had charged the debtor, denounced and registered, whereby the sum in the decret did *ex lege* bear annualrent. A second example may be given in annualrents, which after the denunciation and registration, become a principal, and bear annualrent; and yet from these it never was contended, that the relict is excluded. A third instance is this, money in a tutor's hand, does by law bear annualrent after a certain time; and yet the succeeding heir could not plead a right exclusive of the executor, with respect to intromissions in a tutor's hands, not accounted for, or stocked out upon bond. From all which instances it plainly appears, that even before the 1661, there was a difference betwixt sums bearing annualrent *ex lege*, and where it was due *ex pacto*; and therefore that relicts and husbands had an interest in such sums as bore annualrent only by statute, though they, as well as the executors, were excluded from sums due by contracts and obligations, containing clauses for payment of annualrent and profit.

Replied



Replied for the suspender, It is not the clause in a bond or contract for payment of annualrent or profit, that makes the sum heritable as to the wife and husband, else the clause would be good to make it so, even before the term of payment; which is quite otherwise in law and practice. The true reason why any sum is heritable, is because it is laid out and employed upon annualrent, whereby there is a *tractus futuri temporis*, and a *feodum pecuniæ* constituted; and it can make no imaginable difference, the money being once lent out intentionally to bear interest, that the law has already provided annualrent to run conform to their intentions, or if a special clause is necessary for that effect. To apply this to the case in hand; no mortal can doubt, that a creditor's intention by lending money upon bill, is to have annualrent paid for it: Is not the intention of the creditor the same in this case, as in that of a bond stipulating annualrent? Does not every creditor by bill know, that the exchange-contract makes a sum bear interest, though no provision be made? How then can the not expressing of what is in law implied, the expressing of which adds nothing to the force and effect of the right, make any alteration in the nature thereof? It is allowed, that a clause of annualrent expressed in the bill, would exclude the *jus mariti* and *relictæ*; but what additional effect can the expressing of a clause have, which is virtually in the writing already? Taking up the matter in this view, it will be evident that the examples produced for the charger are not in the case; for in none of them is there any thing like a *feodum pecuniæ*, a laying out of money to continue for a tract of time upon interest: On the contrary, the debtors in all of them are understood to be *in mora*; and upon account of that *mora* alone it is, that the sums bear annualrent *loco interesse*, and not in virtue of any stipulation express or implied.

Duplied for the charger, Adhering to what is above said; the reason why a sum is reckoned moveable, the creditor dying before the term of payment, is, because by adjecting a term to the payment, the creditor had declared an *animus* of levying the money; which *animus* has always a strong influence in determining what is heritable, and what is moveable: But when he survives the term, and calls not for the sum, then it lies indefinitely in the debtor's hand, affording by express paction a revenue; then it became a *feodum pecuniæ*, and by the old law transmitted to the heir by a service, as being a sort of fee. In the next place, The suspender seems to mistake the nature and design of bills, which are never considered as *feoda pecuniæ*, nor intended to have a *tractus futuri temporis*, being designed solely as an expedite method of conveying money from hand to hand; and the bearing of annualrent is not principally intended in the contract, but follows by not at all a necessary consequence, *ex mora loco interesse*.

" The Lords found, That the sum pursued for was moveable, and  
" therefore found the suspender liable."

" The Lords afterwards found in this cause, 16th February 1725,  
" That this bill being only payable three years after date, does  
" not enjoy the extraordinary privileges of a bill of exchange,  
" but is only to be considered as an ordinary debt."



N° LVI.

9th February 1725.

SARAH CARLYLE, Relict of William Lyon younger of Easter Ogle,  
*contra* his CREDITORS.

*Adjudication with a Charge against the Superior excludes not the Terce.*

**W**ILLIAM LYON died invested in fee of an estate about L. 900 Scots of yearly rent; of his creditors only one had an infeftment of annualrent, answering to the principal of L. 1000 Scots: There were adjudications deduced against him, before the marriage with Sarah Carlyle, to the extent of L. 11,900 Scots, whereof some were with charges against the superior during the marriage; the other adjudications, extending to L. 10,700, were without year and day of the former.

Upon these rights it was for the creditors alleged, That the widow could pretend no right to a terce, because the husband was at the time of the marriage *oboratus*; and as he could by no voluntar conveyance or writing have provided his wife in prejudice of his creditors, neither could he by his marriage prejudge them, especially since the wife had brought no tocher.

It was answered, That a wife is not excluded from a terce by her husband's bankruptcy; but in that matter there is in law a distinction made of the quality of the debts, if secured by infeftment, or not; for personal debts prejudge not the terce: In which all our lawyers agree; see *Stair, lib. 2. tit. 6. § 18.* "Terces are burdened by all *debita fundi*, but with no other debts of the defunct being PERSONAL, though they be HERITABLE, and have a provision of infeftment." And though the husband had been really insolvent at the marriage, it would make no alteration; for since the law forbids not a person insolvent to marry, the provision of law must take place in favours of his wife.

It was *2do* alleged for the creditors, That such of the adjudgers as had charged the superior before the husband's death, must be preferred to the tercer; because an adjudication with a charge is equivalent to an infeftment.

Answered, That a charge by the act 1661 is made equivalent to infeftment, in the competition only of adjudgers one with another; but not with other rights: That though in that special case a charge is made equivalent to infeftment, for reasons specified in the said act, in other cases it is not: For that act has not said, that a charge against the superior constitutes a real right; far from it, an adjudication remaining still a personal right till infeftment. Hence it would be an erroneous consequence, if one should thus argue: A charge of horning against the superior is equivalent to an infeftment, therefore an apprising with a charge cannot be carried but by a special service. The answer would be plain, That though the law, in competition of apprisings among themselves, has given this effect to a charge against the superior, it has not confounded the nature of our rights; and an apprising with a charge remains still personal, and is carried by a general service.

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“ The Lords found, That the widow has right to her terce, or  
 “ third of the lands wherein her husband died infest, and pre-  
 “ ferred her for the said terce to the hail other creditors  
 “ adjudgers.”

N<sup>o</sup> LVII.

February 1725.

Mr JOHN KENNEDY of Kilhenzie, Advocate, *contra* Captain HUGH ARBUTHNOT of London.

*Bills prove their Date against the Heir.*

CAPTAIN ARBUTHNOT being sued, as heir to Kennedy of Balterfan, upon three bills accepted by Balterfan, at London, for value, payable to Thomas Kennedy, and which the pursuer Kennedy of Kilhenzie had right to, the defence was, “ That Captain Arbuth-  
 “ not being an heir, bills do not prove their date against him, but  
 “ like holograph writs are presumed to be granted on death-bed; and  
 “ therefore he is not liable, unless the pursuer instruct the bills were  
 “ accepted while Balterfan was in *liege poustie*, or sixty days before  
 “ his death.”

It was urged accordingly for the defender, 1<sup>mo</sup>, There is even less reason that bills be allowed to prove their date, than holograph writs. 2<sup>do</sup>, If bills were allowed to prove their dates, the law against death-bed deeds would be entirely eluded: For it were easy to get a sick man to antedate a bill; and all deeds on death-bed would come to be transacted in the way of bills. 3<sup>tio</sup>, Whatever might be done in the case of foreign bills; with respect to inland bills, and these not among merchants, there is no reason for allowing them any privilege of this kind.

On the other side it was pled, That if bills prove not their date against the heir, it must follow that they prove not their date in any other case; for so it is as to holograph writs, from which the argument in the present case is drawn. Now, holograph writs prove not their date against any third party: See 14<sup>th</sup> January 1662, Dicky *contra* Montgomery; 21<sup>st</sup> June 1665, Braidie *contra* Fairny. And for the same reason it must hold, if one becomes bankrupt in terms of the act 1696, whereby all his voluntary deeds, within sixty days of the bankruptcy, in satisfaction or security of any of his creditors, are void, all holograph writs, though bearing date long before, will be annulled by that statute, because they do not prove their dates. If then bills prove not their dates, more than holograph writs, it must follow, if I owe a merchant in London L. 100 *per* bond, and he draws a bill upon me for L. 50 as part of the bond, which I accept payable to a third party, if this merchant shall afterwards assign my whole bond, the assignee will recover the whole from me; because I cannot make it appear otherwise than from the bill itself, that it was accepted prior to the assignation. In like manner, an inhibition against any man will cut off all bills accepted by him, though never so long before the inhibition: And if one becomes bankrupt, all bills granted by him in satisfaction of any of his creditors, of whatever date, will

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fall to be cut off by the statute 1696. Now if all, or any of these consequences did obtain, bills in a great measure would be rendered ineffectual, a loss irreparable in the matter of trade. But our practice runs directly contrary in every particular; it is an established rule, that no exceptions are good against an onerous indorsee, not even payment made to the indorser, and far less any objection from the date. And accordingly, by the common custom of merchants, both here and elsewhere, bills are probative of their date, as well as of any other thing contained in them: See Forbes upon bills, p. *ult.* As to the defenders arguments: To the *first*, answered, bills and holograph writs are in few things upon the same footing; holograph writs taken as securities for debts, to lie over for some time, are the more suspected, that it is easy for a creditor to get his security made firm by adhibiting two witnesses: but bills that are never designed to lie over, are less suspected when duly negociated, and so are more countenanced than holograph writs. To the *second*, It is allowed the want of formality in bills, may possibly give opportunity to sundry kinds of frauds; but any view of that nature, has never been judged by politer nations, as sufficient to balance the ease and benefit they produce in the subject of commerce. To the *third*, answered, There is no foundation for a distinction in this case; the privileges of foreign bills being in consequence of the late statute, extended to inland bills as to every particular.

“ The Lords repelled the objection.”

N<sup>o</sup> LVIII.

February 1725.

Dutcheſs of BUCCLEUGH *contra* PATRICK DOUL.

*Indefinite Payment.*

**W**ILLIAM INNES was appointed chamberlain of the estate of Dalkeith, in the year 1711, by the Dutcheſs of Buccleugh, who relied upon his personal security for his management. Thereafter, in the year 1714, the Dutcheſs having purchased the feu-duties of Inveresk and Muſſelburgh, granted a factory to the ſaid William Innes, for uplifting theſe feu-duties; and John DouL became cautioner for him. Mr Innes made payment from time to time, of the rents both of the estate of Dalkeith and Inveresk, taking receipts from her Grace's receiver, *indefinitely*; and at clearing accounts in the year 1717, theſe indefinite receipts were aſcribed proportionally to the intromiſſions with the two eſtates, and Mr Innes thereupon diſcharged. Mr Innes continuing his intromiſſions with both eſtates, made his payments, and took indefinite receipts as formerly; and in the year 1723, there is a ſecond account fitted, but in a quite different manner from the other; for in this, all the indefinite payments are aſcribed to the factor's intromiſſions with the eſtate of Dalkeith, and none of them to that of Inveresk; in conſequence whereof, there is a balance ſtated due by the factor Mr Innes, for his intromiſſions with the feu-duties of Inveresk and Muſſelburgh, for the year 1718, and downwards, of the ſum of L. 984 Sterling. The deceased John DouL, the factor's  
cautioner,



cautioner, having been charged for this sum, he suspended, and his reason was, that the indefinite receipts of payment ought to have been applied, in stating the second account 1723, proportionally to the factor's intromissions with the two separate estates, as in the first account; and that the factor (especially being bankrupt) could not by any other method of stating, prejudice his cautioner; and therefore the cautioner could not be liable for the whole balance, but only for a proportion effecting to the factor's intromission with the estate of Inveresk, since the 1717.

Her Grace endeavoured to support her plea from this maxim, "In the application of indefinite payments, *electio est debitoris*." And here both debtor and creditor had concurred in the application, which puts the case beyond dispute: It is certain, that by the fitted account 1723, payment being offered and accepted, of the bygone rests of the estate of Dalkeith, and the factor discharged accordingly, his obligation to account for these rests became *funditus* extinguished, and the Dutcheß at present has no remaining claim for any of his intromissions with that estate; the balance therefore due by the factor, can only be for his intromission with the estate of Inveresk, which concludes directly against the suspenders. The alleged circumstance of bankruptcy makes rather for the pursuer; had the factor been endeavouring to apply his indefinite receipts to the estate of Inveresk, instead of Dalkeith, the Lords would find in terms of the decision, 13th February 1680, Macreith *contra* Campbell, "That a bankrupt cannot apply an indefinite payment to an obligation with cautioners, in fraud of his creditor, to whom he is also due a sum without cautioners;" much more when he has actually applied the indefinite receipts to the obligation wanting cautioners, must the application be sustained. But, *2do*, Granting there had been no application, no fitted account, it must have come to the same thing; for where the parties themselves neglect to apply, the judge will certainly make the application, accordingly as it is presumed the parties themselves would have made it; that is, in other words, "accordingly as would have been most EQUAL for the creditor and debtor, and least to the detriment of either." To take this matter to the bottom, it appears to be plain, that neither the debtor nor creditor has separately the application of payments, but conjunctly; for as debts are contracted by the mutual consent of parties, so must they be dissolved by their mutual consent; *unumquodque eo modo tollitur quo colligatum fuit*; and therefore it is, that the OFFER of payment dissolves not the obligation, but that together with ACCEPTANCE *in solutum*; whence it must follow of necessity, that where the parties differ about the application, there must be some rule to determine who has the choice; which may be readily drawn from the principle of equity, just now mentioned, which teaches, "That that ought to be followed, which is most EQUAL for both debtor and creditor, and least for the hurt of either." And hence this rule of practice, "That he of the two should have the choice, in whose case *agitur de damno evitando*;" agreeably to the maxim, *Potior debet esse conditio ejus, qui certat de damno evitando, quam ejus qui certat de lucro acquirendo*. And here by the way it appears evident, that the cautioner's interest cannot come in to the account, who has no vote in the application of his principal  
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the debtor's payments. It is noways inconsistent with this doctrine, what is commonly held, that *electio est debitoris*; for this was never designed to be an universal rule, though it holds in abundance of cases, as in all these, where there is a *durior fors*; for example, where a debt is due under a penalty; and it is this very law of equity, which gives the debtor the choice, in order to prevent the creditors getting an unequal or odious advantage. Another example is, where an adjudication has been led upon one of the debts, and the legal year expiring; there equity again dictates, that the debtor has the choice in the application of his payment, to prevent his estate being carried off, likely for a small debt. In both which examples it is evident, the debtor is *certans de damno evitando*, whereas the creditor is *certans de lucro acquirendo*. To apply this rule of equity to the case in hand, it will conclude, that the indefinite payments ought to be applied to the debt without a cautioner, rather than that with a cautioner; it being precisely the same to the debtor, which of the debts they be applied to, and a manifest detriment to the creditor to apply them otherwise, which squares exactly with the rule, "That the application be made so, as least for the hurt of either." The pursuer concluded, she was sensible the Roman law, though for her as her case in fact stands, is against her in this shape of her argument; see *l. 3. et 4. solut.* where amongst other examples, a bond with a cautioner is reckoned a *durior fors*, in which, of consequence the debtor has the election; but this truly seems to have slipped from a hasty pen: For there is no apparent reason, for judging a debt with a cautioner, to be a *durior fors* upon the principal debtor, than where it is constituted by his single obligation; it makes no difference in his circumstances, which of the obligations be first dissolved, though it does in the creditors, who in such a dispute is plainly *certans de damno evitando*.

It was answered for the defender, whatever may be in the general point, his reason of suspension is certainly good, from the circumstances of his case. Mr Innes the factor intromitted with the rents of both the estates at the same time, he did not, nor was there occasion to keep his intromissions in *distinct stocks*; he made partial payments out of the *common stock*, and took indefinite receipts; and the presumption is, which was certainly the fact, that accordingly these payments were partly out of the rents of Dalkeith, and partly out of the rents of Inveresk. It will be obvious, that this view of the case, takes the dispute entirely off the footing of *indefinite* payments. Here the payments were in no proper sense *indefinite*; for as they were drawn out of the common stock, which was composed partly of the rents of Dalkeith, and partly of the rents of Inveresk, they must impute proportionally, in the distinct obligations the factor lay under to account for these rents. This case then falls to be the same, as if the receipts had born an express clause, *in part payment of the rents of Dalkeith and Inveresk*; and the law here makes the application as distinctly, as where it is expressed. Taking the matter upon this footing, it was contended for the defender, that even supposing the factor not to have been bankrupt, there was no liberty left to make up the accounts, as was done in the 1723: By the several partial payments made by the factor, proportionally out of the two estates, the  
rents



rents of Inveresk were in so far paid up, and both principal and cautioner in so far exonerated of their obligation; and the factor thereafter could no more apply these partial payments, wholly to his intermissions with the estate of Dalkeith, in prejudice of his cautioner, than he could retire a receipt expressly relating to the rents of Inveresk, and take a new receipt for the same sum, as part of the rents of Dalkeith. But, *ad*o, (to follow the pursuer in her argument) Allowing all these payments had been strictly indefinite; still it is contended, that equity would never allow the bankrupt, even with concurrence of his creditor, to apply these indefinite payments to the manifest prejudice of his cautioner. It appears to be a plain case, that the bankrupt could not directly make payment to his creditor in prejudice of his cautioner, who is also his creditor for relief; for this would be a partial preference of one creditor to another: And there is precisely the same reason, that neither should he have it in his power, by applying an indefinite payment, to prefer one creditor to another; since in any strict sense, it is the *application* only that makes the payment. The rule of equity laid down by the pursuer is good in so far as relates to the creditor and debtor alone, but will not apply when third parties are concerned; for in the present case, it will never be allowed indifferent to the debtor, whether he apply his indefinite payment to the obligation with or without the cautioner: The cautioner is his creditor for relief, and he is as much bound to satisfy that obligation, as the other; and if the debtor should go about to defraud him of his relief, the cautioner has as proper an interest to see to his security, as the principal creditor has, to whom he is bound as cautioner. In this competition then, betwixt the two creditors, about the application of the indefinite payments; according to the pursuer's rule, since they are equally *certantes de damno evitando*, neither can be preferred in the application; but being *in pari casu*, the application must be made proportionally. The decision *Macreith contra Campbell* is cited on the other side; but it makes nothing against the defender: It was found only in that decision, that the bankrupt's application of his indefinite payment must be set aside; which was most just: But it goes not on to determine what fell to be the legal application, though it may readily enough be inferred from the decision agreeably to the above doctrine. Thus, upon the same principles, the bankrupt's application was set aside in prejudice of his creditor, and in favours of his cautioner; upon the same fell it to be set aside, if made, as in the present case, in favours of his creditor, and in prejudice of his cautioner: What is to be inferred from this, but that they were *in pari casu*, and of consequence had a legal title to have the application made proportionally to their respective interests?

“ The Lords found, the indefinite receipts of payment made to  
 “ the Dutchess's receiver ought to have been applied proportion-  
 “ ally, and that Mr Innes could not, by accounting in another  
 “ manner, prejudice the cautioner.”



N° LIX.

22d July 1725.

SCHAWS and their HUSBANDS, and RANKEN in Blairquhan, their Assignee, *contra* the HEIRS-PORCIONERS of Glenour.

*Præceptio hereditatis transit in heredes.*

**T**HE deceased John Kennedy of Glenour, granted bond to Schaw of Nether-Grimmot, to which the pursuers had right by progress. After contracting this debt, Glenour, the debtor, disposed his estate to Alexander Kennedy, his eldest son and apparent heir, who became thereby liable to his father's debts *præceptione hereditatis*. Alexander Kennedy afterwards dying, an action was brought upon the said bond against his sisters, as heirs served to their brother, who represented the father *præceptione hereditatis*.

The defence insisted on, was, That the passive title *præceptio hereditatis non transit in heredes*; and therefore the defenders, heirs only to the person who was liable in that passive title, could not be made liable upon that *medium*, farther than *quatenus pervenit*; that is, for the value of the subject disposed to their brother. And it was pled, That *præceptio hereditatis* is a penal passive title; none of which go against heirs: An apparent heir accepting a disposition, without any burden of debts mentioned, has no intention thereby to represent his predecessor, neither is he made liable under the character of heir; for then he would be equally subject to all the debts prior or posterior: It remains only, that he is liable upon the *medium* of a penal certification, made by the law *in odium* of apparent heirs, to punish their accepting conveyances of their predecessor's estate, with a design to exclude his creditors. It was added, That this passive title has a great resemblance to that of a *behaviour*; and, indeed, *behaviour* ought rather to pass against heirs, than *præceptio*: By behaving, one mixes himself in the succession, whereby his design to represent the predecessor is presumed; and therefore the law subjects him universally: But in regard that it is penal for one who makes but a trifle, perhaps nothing by his *behaviour*, to be liable *in infinitum*, the passive title becomes extinct with himself; and his heir cannot be reached upon that *medium*. All which, equally applies to the passive title now in dispute.

It was answered, If by the allegiance, "That penal actions do not transmit against heirs," the defenders mean, that no action transmits against an heir, farther than the defunct was *lucratus*; this is contrary to express principles of law: For when one enters heir in a *damnosa hereditas*, the making him liable *in infinitum*, is in this sense *penal*; and yet this burden would pass against the heir's representatives, without the least mitigation. By *penal actions*, are only meant such as have their rise *ex delicto*, or *quasi delicto*; which is the foundation of that passive title, *vitious intromission*. A disorderly intromission with a defunct's effects, the law absolutely prohibits, and has annexed a sanction to the prohibition; in which view, the passive title is evidently a penalty: But from this, a *præceptio hereditatis* differs in every article. No body has said, save the defender, that the law discourages



rages conveyances to apparent heirs, or that the passive title *præceptio hereditatis* is introduced *in odium* of apparent heirs; on the contrary, transactions of that kind are highly reasonable, providing there is no intention to defraud creditors, (and therefore, the law has burdened them with the then existing debts of the disposer): And since they are authorised by the law, under that limitation, they can have nothing of delinquency in their nature, and the passive title cannot be penal. That this passive title of *præception* is not introduced *in odium* of apparent heirs, will further appear from this consideration, that were this the motive, it ought to extend to all gratuitous dispositions, whether the receivers were *alioqui successuri*, or not; being all of them equally hurtful to creditors; and yet a gratuitous conveyance, though in law reducible where fraudulent, makes no receiver universally liable, but he who is *alioqui successurus*; and yet surely there is no more vitiosity in the case, than if the conveyance had been made to a stranger. As for the *gestio pro herede* mentioned by the defender, as one of the passive titles that pass not against heirs; the reason is not, that there is any thing *penal* in this passive title in any proper sense of the word; but because, it being *magis animi quam facti*, after the death of him who is said to *behave*, his successors cannot well explain *quo animo* or *titulo* he did intromit. In the *last* place, it was noticed for the pursuer, That this point was already decided, 3d December 1701, George Wilson *contra* Innes of Achluncart; where it was adjudged, that this passive title, *præceptio hereditatis*, had the same effect with a service as heir, in these two respects: 1mo, That it did not prescribe; 2do, That *transit in heredes*.

“ The Lords found the defenders liable *in solidum*.”

N<sup>o</sup> LX.

28th July 1725.

The Viscount of GARNOCK, *contra* the Master of GARNOCK, and the other HEIRS of ENTAIL of Sir John Crawford of Kilbirny.

*The Act 1685 anent Tailzies, regulates all posterior Conveyances, whether the Tailzies were made before or after the Act.*

SIR John Crawford, *anno* 1662, made an entail of his estate of Kilbirny and others, in favours of his daughter Margaret, and the heirs therein substitute to her, with prohibitory and irritant clauses against contracting of debt; upon which followed a seisin to Margaret, containing verbatim the limitations and provisions in the entail. After the death of Margaret, the first institute, John, afterwards Viscount of Garnock, her son, was infeft as heir to her; but neither his service or seisin contained verbatim the limitations and clauses irritant, only a general reference “ with and under the reservations, provisions and conditions specified in the former charter “ and infeftment.” The late Viscount having contracted a great burden of debts which were corroborated by the present Viscount, it was thought advisable to raise a process of sale of part of the entailed estate, that the Lords might interpose their authority thereto. Comparence was made for the creditors, and at the same time for the Master



Master of Garnock and the heirs of entail; who being called as defenders, did object, "That the estate could not be sold for the payment of any debts contracted by the pursuer, or by the deceased Viscount, his father, in regard that by the settlement and entail of the estate, made by Sir John Crawford of Kilbirny 1662, both the pursuer and his father were so limited and restrained, that they could not charge the estate with debts; and of consequence, could not sell the estate for payment of these debts that were illegally contracted." The creditors on the other hand alleged, "That the entail could not be effectual against them, because the irritancies were not repeated in the retours, precepts and seifins, according to the direction of the act of Parliament 1685."

In answer to which, it was pled for the Master and other heirs of entail, That the act 1685, does not at all concern deeds of settlement, or entails made prior to its date; it does not declare what was law before, or what was the import of deeds made before: Nor does it once, in any clause, mention deeds of a prior date; but every clause is introduced by words relative to what is statute by the act itself, and to nothing else. Nor is it absurd, that at this rate, tailzies made before the act, are stronger than those made after: The Legislature thought fit by the act 1685, that creditors might not be ensnared, to regulate the form of entails thereafter to be made, and to enjoin some solemnities that were not necessary before the act: But does not this happen every day with relation to correctory laws? Thus, a seifin before the act 1617, is valid without registration; and thus an obligation, though now ineffectual without the writer's name and designation of the witnesses insert in the body of the writ, was formerly good without these solemnities.

Replied for the creditors, The words *statutes and declares* are general, equally referring to prior and posterior tailzies; nor will the design of the act, which was the security of creditors, admit of any distinction: It was obvious, that creditors were exposed to innumerable snares by the then constitution of tailzies. From the nature of the thing, a tailzie being once established by limitations and qualifications in the original infestment, the limitations were good against all singular successors, because none of them could convey the right otherwise than they had it; and no *bona fides* could protect the purchaser, unless joined with a forty years positive prescription: Now this being highly inconvenient, this act has appointed various certifications, whereby creditors and purchasers are absolutely secured; and as there is the same reason that these certifications take place in all tailzies, whether before or after the act, it is against reason to imagine, that the lawgiver, who has confessedly discovered such anxiety to secure strangers contractors, with respect to entails to be made after the law, designed to leave them exposed to tailzies made before. Here the creditors are not pleading that the act has a retrospect; they contend only, that without distinction of tailzies when made, it regulates whatever TRANSMISSION is posterior thereto: And it is certainly just as easy to insert the prohibitory and irritant clauses in the CONVEYANCES of tailzies made before the act, as where they are made after.

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It was pled, in the *second* place, for the Master of Garnock, If it shall be found, that this tailzie is comprehended under the act 1685, he can still subsume and say, that the irritancies are engrossed in the conveyances, according to the appointment of that act; indeed not *verbatim*, but by a general reference sufficient to put creditors *in mala fide* to contract, without looking into the original infestments where the irritancies are at full length; which to all intents and purposes is answering the design of the thing.

The creditors answered, That it will not be found a sufficient fulfilling the law, unless the irritant clauses are REPEATED in all the subsequent conveyances; for such are the words of the act: So that a general reference, which may be easily overlooked by creditors, can neither answer the words or intention of the statute.

“ The Lords found, That the act 1685 regulates the TRANSMISSION  
“ of tailzies made before the said act, as well as these made  
“ since; and found, that the general reference in the seisin is  
“ not sufficient to interpel creditors according to the act  
“ 1685.”

N° LXI.

17th November 1725.

Competition the CREDITORS ASSIGNEES of Mr David Watson, with  
DAVID MUIRHEAD of Linhouse.

*Disposition by a Bankrupt in favours of his whole Creditors, not reducible upon the Act 1696.*

**M**R David Watson having contracted great debts, did upon 2d May 1723, convey his whole effects in favours of his creditors, “ to be disposed of by them or their trustees, and the price to be applied towards the payment of their debts, equally and proportionally according to their several rights and diligences :” And particularly, he assigns in favours of his creditors, the sum of 8000 merks, due to him by Mr William Violand, professor of humanity in St Andrew’s; and this assignation was duly intimate to Mr Violand by one of the creditors, as procurator for the rest, upon the 6th of the same month. Mr Muirhead, one of the creditors, thinking to provide better for himself than was done by the assignation, did thereafter arrest in the hands of the said Mr Violand, upon the 13th of the said month.

The case coming to be tried in a multiple-pounding, it was argued for the assignees, That the assignation being duly intimate, did fully denude Mr Watson of the sums assigned, so that they could not be affected by diligence at the instance of his creditors.

It was answered for the arrester, That the assignation was null in terms of the act 1696, being a voluntary right granted by a notour bankrupt; in which circumstances, he could do no deed to invert, alter or prevent the legal rule of preference amongst his creditors, which is determined to be according to their diligence: It would, indeed, be giving a power no way agreeable to the state of bank-

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ruptcy,



ruptcy, to indulge one in that condition by any voluntar deed of his, to disappoint even the chance of his creditors their diligence, and to bring them in, though *pari passu*, contrary to the tenor of our law, which prefers the vigilant according to their diligence. *2do*, Creditors being under no obligation to accept of any disposition, but having by the law right to prosecute their diligence, no voluntar right made by the *dyvour*, unless they accept, can deprive them of their right to use, or the benefit of their diligence when used; and though all the rest accept, it is in the power of any one that stands out, to follow forth his diligence; in which, the bankrupt's hands by the law being tied up, the creditor cannot be prejudged.

Replied for the creditors assignees, That allowing Mr Watson was at the date of this disposition to his creditors, a notour bankrupt in terms of the act 1696; yet they apprehend this disposition is neither null or reducible. And for clearing this, it was offered to consideration, *1mo*, That though a notour bankrupt can do no *fraudulent* deed in *prejudice* of his lawful creditors, he still remains proprietor; his bankruptcy does not denude him of his estate real or personal, nor of the power of conveying it by voluntary rights. *2do*, That voluntary rights, even granted in favours of his creditors, are not simply *null*, but make a conveyance; though such conveyance be reducible upon the statute, if *fraudulent*. As to the *first*, His disposition for an onerous cause will effectually convey his property; the onerous purchaser will be secure, and his right not subject to a reduction upon this statute. This the assignees apprehend is a demonstration, that bankruptcy does not divest the bankrupt, or incapacitate him to grant voluntary conveyances. As to the *second*, Supposing a notour bankrupt dispoise his lands in favours of a creditor, and this creditor convey to an onerous purchaser; it is thought it could not be a question but the purchaser would be secured, however the creditor his author be liable in repetition. In like manner, supposing the bankrupt grant a disposition to his whole creditors equally and proportionally, which they accept of, and take infestment thereon; if the bankrupt afterwards contract debts, his other creditors cannot plead, that the disposition was null, and the subjects disposed affectable by their diligence. And, in the *last* place, If a bankrupt grant a voluntary conveyance of land or money, to one creditor in prejudice of the rest, it is thought, that neither the superior of the land so disposed can object the nullity, or the debtor whose debt was assigned, refuse payment upon the head of bankruptcy. These instances are sufficient to make it evident, that voluntary conveyances granted by a bankrupt in favours of his creditors, are not simply null, but reducible; and that nothing more is introduced by the statute 1696, or indeed intended, but to tie up the bankrupt's hands from doing fraudulent deeds in prejudice of his lawful creditors, and to give a right to his creditors to reduce such deeds done to their prejudice.

This being established, the assignees apprehend that their competitor the arrester must subsume, and say, "That this deed granted by Mr Watson is a fraudulent deed done to the arrester's prejudice." As to which it is contended, There is not the least pretence of fraud in the case. Suppose a man, owing 20,000 merks, has his stock reduced, by shipwreck, fire, or other misfortune, to 10,000; the debtor,



bitor, willing to do all justice to his creditors, divides his money equally amongst them: Can this be called a fraudulent deed, when he, without any trouble or charge, gives them all the satisfaction they could possibly obtain after a course of expensive diligence? And as this is the present case, it cannot in any view be fraudulent; on the contrary, it is the most honest and fair thing a bankrupt can do, a deed neither fraudulent, nor to the prejudice of one creditor in favours of another; they have his whole effects divided among them according to their several rights and diligences: They are not obliged to discharge their debts upon drawing their proportion, which is the case of a statute of bankrupt in England; their debts still subsist against the debtor's person, and any future acquisition. Neither is any ground of preference competent to one creditor against another cut off: The disposition is expressly qualified "to each according to his rights and diligences;" and so if one creditor had an infestment, and another a preferable arrestment, they in consequence of this disposition would draw their whole sum, leaving to the simple personal creditors their proportion only of what remained: So that the sole intention of such a disposition is, to denude the debtor of his funds by one single deed, and to state his right in his creditors, without the expensive circuit of legal conveyances by adjudications, poindings and forthcomings; and at the same time to preserve an equality amongst them. This being the only possible design and consequence of such a disposition, it is submitted if it can in any sense be reckoned prejudicial to one or all of the creditors. It is true, such a disposition does prevent the benefit that might arise to one creditor, by outrunning another in the course of his diligence, and the *little arts* made use of for that purpose: But sure, being deprived of this dishonest advantage, this *turpe lucrum*, can never be construed in law a *damage*, or such a *prejudice* as to found an action of reduction.

As to the *second* point in the arrester's pleading, touching the *necessity of acceptance*; The assignees admit, that the objection would have its weight, if the case were to be determined by the Roman law, where a disposition, till accepted by the disponent, conveys no right. But we follow not the Romans in this matter: We hold, that a disposition in any person's favours needs no acceptance, but that it directly establishes the right in him, even in his absence, and without his knowledge: Yea, so certain is this, that in a deed betwixt two, a right may be established in favours of a third, without his knowledge or concurrence, which it shall not be in their joint powers thereafter to recal. Thus, in the present case, the assignation, when intimate in the creditor's name, fully transferred the debt in their favours; which could not be destroyed, but by their positive rejection of the right. The assignees need not go about to establish this by authorities or decisions; it is a principle in our law, and so laid down by Lord Stair in his Institutions, *L. I. t. 10. § 4. & 5.*

"The Lords found, That a disposition simple unqualified, and  
 "completed by a bankrupt in favours of his whole creditors,  
 "was not reducible upon the act 1696, at the instance of a posterior arrester."



N° LXII.

23d November 1725.

SIR WILLIAM NAIRN of Dunfinnan *contra* Captain LAURENCE DRUMMOND.

*Oath of the common Debitor good against Arresters.*

**S**IR William Nairn, as creditor to Mr Thomas Crichton of Tullifergus, then a bankrupt, used arrestment in the hands of Captain Laurence Drummond, and pursued a forthcoming; wherein he offered to prove the debt *scripto*, and recovered two bonds, of date 10th January and 8th April 1709, granted by the said Laurence Drummond to Mr Crichton, for 500 merks each. The defence proponed was, "That these bonds were granted *spe numerandæ pecuniæ*, and that "no money was actually advanced; which was offered to be instructed by Crichton the common debtor's oath."

It was answered, That an arrestment, whether it be a complete conveyance or not, entirely denuding the common debtor, makes at least a *nexus realis*, establishes a *separate interest* in the subject in favours of the arrester; which can be taken away by no single oath, save his own: That an oath of party being binding in consequence of a *tacit contract*, can have no manner of effect except betwixt the *contractors*, and can have no influence upon the diligences or rights of third parties.

Replied, A debtor's case ought in equity to be made no worse by the transferring of his obligation from one creditor to another. If a creditor assign, the debtor ought not to suffer by the assignation; and if arrestment be laid on, which is a legal assignation, the reason is the same; according to the maxim, "*Alteri per alterum iniqua conditio inferri non debet*:" And therefore, were the dispute betwixt Captain Drummond and Mr Crichton; as there is no question but the exception of non-numerate money would be competent by his oath, equity makes it competent against this arrester. It is true, positive law has introduced some exceptions in this matter, in order to prevent greater inconveniencies; as in the case of onerous assignees and purchasers: There the favour of commerce, and security of purchasers, has made the onerous purchaser in a better condition than his author, with respect to his author's oath. But as these exceptions have been introduced by custom, no argument can be drawn from them to introduce new exceptions, or to make further encroachments upon the general rule, which is so strongly founded in common equity. The reason of these exceptions holds not in the case of an arrester: He did not contract upon the faith of the subject arrested; but took his hazard, when he lent his money, as well of his debtor's honesty, as his sufficiency: And this is the reason too, why the cedent's oath is good against gratuitous assignees, though they have a distinct interest in the subject, certainly more than an arrester. But *2do*, What if it be held that the common debtor's oath is good against the arrester, not only as an oath of party, but in another view, as a valid proof, and truly as strong a proof as can be in the nature of the thing? It is no novelty, if the Judges shall sustain the oath of one witness



witness as a proof, where it is joined with such strong presumptions of truth, as perhaps to make a greater evidence than the oaths of any six indifferent witnesses: What is it that makes the oath of a party against himself so strong an evidence, but a violent presumption, that nothing could influence a man to swear to his own prejudice, but the force of truth? Is not the common debtor in this case virtually swearing to his own hurt, if he shall acknowledge, that notwithstanding the bonds, he never gave the money to Captain Drummond? Is it not in every respect his interest, that Sir William Nairn prevail in the forthcoming? And if he do acknowledge that Captain Drummond is not truly his debtor, is not this effectually swearing against himself? Is not then the common debtor's oath an evidence much to be depended upon, an absolutely good proof in the nature of the thing, and consequently good against all mortals? Captain Drummond is sensible that this reasoning tends to make the cedent's oath even good against the onerous assignee; which upon this scheme it would certainly be, if it were not that by granting the assignation, he has already virtually declared that the debt assigned is a good debt, and truly resting owing; after which, to be sure he cannot be admitted to declare the contrary: And if notwithstanding this virtual declaration of the validity of the debt, the cedent's oath is sustained against a gratuitous assignee, that must be understood as a singular exception, because the case of gratuitous assignees is less favourable; besides that gratuitous assignations are presumed to be done with less notice, without any exact scrutiny into the circumstances of the debt, the right in such a case being understood as conveyed *talis qualis*, which is otherwise in onerous transferrences.

Duplied for the arresters, to the *first*, It is allowed that all privileges and exceptions competent to the debtor from the *nature* of his debt, as they are competent against the cedent, are competent against every assignee; because such are founded, not in the *circumstances* of the *creditor*, but of the *debt*, and so must be good against the debt wherever lodged; so far the arrester contends not: But can it be pled with any show of reason, as to privileges and exceptions competent to the debtor merely upon *personal* respects, that are founded no way in the *nature* of the right, but in the circumstances of this or that *creditor*, that even these are competent against assignees? He presumes the bare proposal of the question is sufficient to show the absurdity. Mr Drummond indeed pleads the equity and favourableness of his case, but without reason: For whatever might be said against the arrester, were his a gratuitous debt, as it is onerous, his case is equally favourable with that of his antagonist; and so being *in pari casu*, their dispute falls to be determined by arguments drawn from the nature of the thing, and not from favour or equity. Neither can favour be the cause, why the cedent's oath is not good against the onerous assignee: It may be true, that onerous purchasers of land-rights are indulged in some privileges, so as to be free from latent exceptions and claims; but that never was extended to assignees in other rights: The assignee ought to know with whom he contracts, and is understood to rely principally upon his warrandice. Hence it is that all exceptions are competent against him, which are any way founded in the *nature* of the right, not merely *personal* against the cedent: And

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were favour the rule, there would be as good reason to deny compensation, and other *real* exceptions against the onerous assignee, as to deny the cedent's oath. To apply; since the oath of the cedent, being merely *personal*, is denied against the voluntar assignee, not from *favour*, but the *nature* of the thing; the same must hold equally with respect to an arrester, who is a legal assignee. Duplied to the *second*, Whatever might be said were the common debtor entire; as he is bankrupt, his oath can militate no more against the arrester, than the oath of any indifferent witness; for being secured against the arrester's recourse by his insolvency and a decret of *cessio bonorum*, it must be entirely indifferent to him, whether the arrester or the debtor in the forthcoming prevail: And so it becomes a supposable case, that he may collude with the debtor in the forthcoming, perhaps for some share of the gain, to disappoint the effect of the arrester's diligence.

It was likewise noticed for the arrester, That here Mr Drummond suffered the bonds to continue in the common debtor's hands ever since the 1709, which he would not have done, if not truly debtor. To which it was answered, The presumption lies evidently on the other side, since Mr Crichton never once demanded payment during all that space, of either principal or interest, that there was truly nothing due: It is a much more supposable case, that Mr Drummond having a thorough confidence of his friend's honesty, might neglect to retire these bonds, than that Mr Crichton, had he been truly creditor, would neglected to demand payment: Neglecting to retire the bonds, was neglecting only to prevent an inconvenience, which there was no great prospect would ever happen: Neglecting to call for annualrents, is neglecting to do an action, by the not doing of which, the creditor is actually suffering every minute. Replied, The small importance of the one neglect, and great importance of the other, makes the opposite presumption still prevail: By neglecting to call for annualrents, the creditor loses only the annualrents of these annualrents; by neglecting to retire the bond, one runs the hazard of being made liable for a principal sum he never received.

"The Lords found, That an exception of not numerate money  
 " may be proven by the common debtor's oath, after arrest-  
 " ment: But in regard that in this case Mr Drummond allowed  
 " the bonds to lie in the common debtor's hands for so long a  
 " space, and that the common debtor is bankrupt; therefore  
 " found it cannot be proven by Thomas Crichton's oath."

N° LXIII.

26th November 1725.

Competition Sir WILLIAM COCKBURN, with the CREDITORS of Thomas Calderwood.

*Executions of general and special Charges not necessary to be produced after twenty Years.*

**I**N the competition betwixt these parties, about a subject in Mortonhall's hands; Sir William's interest was an adjudication led by Dr Hay, against a principal debtor; and the debt being shortly thereafter



thereafter satisfied and paid by Sir William's predecessor as cautioner, the adjudication was conveyed *anno* 1720, out of the *hereditas jacens* of the Doctor, by a process at Sir William's instance against his representatives. It was objected by his competitors, That the adjudication is null, *1mo*, Because it proceeds upon a decret of constitution, wherein the passive title is a general charge to enter heir, and yet the executions of the general charge not produced. *2do*, It proceeds against an apparent heir, as specially charged to enter heir to his predecessor, and yet no special charge or execution produced.

It was answered for Sir William, That general and special charges are of the nature of warrants, which are usually left with the clerks of process; and custom has introduced a prescription of twenty years, in favours of parties, that they are not to be answerable for warrants after that time; and a most equitable prescription it is, that one for ever be not liable for the negligence of others. *2do*, Were it even so, that general and special charges are not to be considered as warrants, but as grounds, and presumed to be in the possession of parties themselves; (however far the want of the instruction of any step of diligence might operate against the party user of the diligence, who ought to have all in his possession;) the case of singular successors is more favourable, who have frequently difficulty to recover their author's papers. And here Dr Hay's writs were in so great disorder, that Sir William was even forced to take second extracts of the bond and adjudication; which points at a fair account, why he never came to be master of these general and special charges. And it was concluded to be extremely hard, if diligences shall be found null, especially in the persons of singular successors, after so long a time, there being not only twenty, but almost forty years elapsed, since the date of the adjudication; and all for the falling by of an instruction of a common step of diligence, which every creditor has it in his power to do without any trouble; and which no creditor is presumed therefore to neglect.

In reply to the *first*, The following argument was made use of, to show, that general and special charges are not warrants, but grounds. The distinction betwixt grounds and warrants, must either be with relation to the judge, who pronounces the sentence, or the clerk who makes out the decret. With relation to the judge, all these that are commonly reckoned grounds, bonds, bills, &c. are the warrants of his sentence; so that it can only be with relation to the clerk, that the distinction is made; and these are called warrants, which the clerk ought to keep as vouchers of his extracts; and all that can be necessary for that end, is the summons, to shew the nature of the process; the depositions of witnesses, for the proof; and the minutes, for the sentence; which without more, must be full authority for clerks to extract any decret. In this view, general and special charges can no more be reckoned warrants, than hornings, arrestments, inhibitions, or any other extrajudicial step of diligence; or even than bonds or bills, which indeed are all of them warrants to the judge; but his sentence, instead of all of them, sufficient warrant to the clerk. And accordingly the custom runs, that seldom (if ever) are general and special charges left with the clerks, but taken up by parties with their other grounds.

Replied



Replied to the *second*, It is enough for the creditors to say, that Sir William Cockburn's progress wants two mid-couples; and that either these mid-couples never were, or at least are liable to objections, sufficient to annul the whole progress. This objection is undoubtedly good against every mortal, who pretends any interest in the progress, singular successor as well as author. It is indeed possible, that the general and special charges might have been duly executed and fallen aside by accident; but since it is also possible they never were, or were not legally done, which is the same upon the matter, the creditors ought not to lose an objection, that possibly may be competent to them; and their competitor ought not to have a possibility of being made better by the loss of his own writs.

Duplied, The accidental falling aside of Sir William's papers, ought in reason to give no more benefit to Sir William's competitors, than to himself. What then must be concluded? Just this, the judges will consider upon whose side the greatest weight of presumption lies, and determine accordingly, *sciz.* Whether it is most probable that these executions were legally done, and fallen aside by accident, or that they were never done, or not done legally. And when the dispute is brought to this shape, it will be no difficult matter to point out, upon whose side lies the strongest presumption, if it be certain that not once of a thousand times, are any of these common and usual steps of diligence neglected altogether, or executed with any substantial informalities; when at the same time, the *casus amissionis* is condescended on, a probable account given, how by the lapse of many more than twenty years, these executions might have fallen aside.

"The Lords found, That the want of the executions of the general and special charge, after twenty years, is no nullity nor ground of reduction."

N° LXIV.

24th December 1725.

JACOB GOMES SERRA *contra* ROBERT late Earl of Carnwath.

*Contracts of attainted Persons.*

JACOB GOMES SERRA having sued Robert late Earl of Carnwath, upon his bond or obligation, for the payment of L. 8000 Sterling, laid out by him at the Earl's desire and for his behoof. The defender moved an objection, "That by reason of his attainder, he was under an incapacity to contract, or to bind himself in payment of any sums, and therefore the obligation granted by him to the pursuer, was in law void, and could neither afford action, nor be received as evidence in any court."

It was answered, *imo*, That attainted persons are under no incapacity to contract or bind themselves; the law has not said so: It is very true, That no person after he is convicted, or attainted of high treason, can by deed or contract alienate in prejudice of the Crown; but nothing hinders him to acquire by contract, or any other way, though such acquisitions will go to the Crown: And therefore as no person contracting with the Earl, could object his attainder, to save them



them from performance, far less is the objection competent to the attainted person himself. But *2do*, Supposing him utterly incapable to contract, by a personal objection he is removed from objecting that incapacity, in respect that insisting in such an objection, would infer a fraud and crime against him: Will he himself, or by others, receive the pursuer's money, and yet directly against the faith of his obligation, pretend to screen himself from payment? No law will indulge such dealing. The same way a person under age, whose contracts are voidable, giving out that he is of age, or without directly affirming, managing a trade, and thereupon getting another's money or effects in his hands, will not be heard to object against his contracts; for the law says, *deceptis non decipientibus jura subveniunt*. There are many cases in our law, where a party, though the contract be void, cannot plead the nullity: And this happens in every case, where the party pleading, before he can come at the voidance of the contract, must *allegare suam turpitudinem*. And so the Lords, in a case, where two parties entering into a compromit, referring their differences to the award of one convicted of high treason, found, "That there lay a personal objection against one of the parties who endeavoured to avoid the award, because the circumstances of the arbiter, being known to that party, at the time of his entering into that compromit, he argued his own fraud, in thereafter objecting to the arbiter's incapacity, which in effect he had renounced, when he brought his neighbour into the compromit."

"The Lords found, That there lay a personal objection against the defender's objecting his incapacity to contract."

N<sup>o</sup> LXV.

December 1725.

AIKENHEAD of Jaw *contra* RUSSEL of Elrig.

*An Heir entered cum beneficio inventarii, is obliged to communicate Easies.*

THE present Thomas Russel of Elrig having served himself heir *cum beneficio inventarii* to his father, and given up inventories in proper form, entered into agreement with one Cowburgh, who was possessed of several adjudications upon the estate, above the value thereof; whereby Cowburgh accepted a part of the lands contained in the inventory in satisfaction of his debt, and discharged the remainder. Aikenhead of Jaw having right by purchase to a debt of 1000 merks, due by the deceased Russel of Elrig, insists against this Elrig, as heir served and retoured.

It was alleged for the defender, That he was heir *cum beneficio inventarii*, and that the inventory was exhausted, Cowburgh and his authors having adjudged for sums far exceeding the value. It was answered for the pursuer, That the adjudications were satisfied by the heir *cum beneficio*, out of the subject of the inventory, by payment of sums, or disposition of lands; which sums paid, or lands disposed, did not extend to the value of the inventory, and consequently could not exhaust it. The defender replied, That this was *jus tertii* to the pursuer, an heir *cum beneficio inventarii* not being



obliged to communicate eases; and that it was sufficient to say, that Cowburgh's adjudications were exclusive of the pursuer's claim.

The question arising, If an heir *cum beneficio inventarii* is obliged to communicate eases? it was pled for the pursuer, That before the act of Parliament 1696, diligences upon a predecessor's estate, acquired by the apparent heir, were redeemable by the creditors for the sums truly paid: But whatever reason there is with respect to apparent heirs, will equally obtain, that neither should heirs *cum beneficio inventarii* be allowed to clothe themselves with singular titles affecting their estate, to the exclusion of other creditors; and therefore it must be presumed, that as to this point the law has left heirs entering *cum beneficio inventarii*, upon the same footing they were before their entry. And truly were this otherwise, the act of Parliament, instead of being a new security to creditors, would afford an easier method for the heir to disappoint them than ever he had before: For heirs served *cum beneficio inventarii*, being best able to discover the condition of the debts, and the objections against them, would have the fairest opportunities to maintain vexatious suits against the creditors, and by purchasing in some preferable rights, to exclude all the rest. 2do, Heirs *cum beneficio* are in effect but trustees. What transactions they make, must accrete to the creditors, and disincumber the estate. This is clear from the words of the statute, ordaining, "That the apparent heir shall have access to enter to his predecessor upon inventory, as use is in executries and moveables." And it cannot be disputed, but an executor is a trustee, both for the inventory, and for the behoof of the creditors: And as such the Lords have found, "That executors are bound to communicate eases to the other creditors, suppose such eases were given by the other creditors, out of respect and favour for the executor, 16th December 1710, Sir James Elphinston *contra* Anne Paton." And no imaginable reason can be assigned, if this is law in the case of executors, why it should not obtain in the case of heirs *cum beneficio*.

It was answered to the *first*, That no good argument can be drawn *ab incommodo*, to weaken the privilege given to apparent heirs by the statute, which ought to be interpreted benignly for them, and not so as to make the intention of the lawgivers wholly frustraneous; which would be, if heirs so entering were not capable of taking by the bounty of their father's creditors. Neither is the argument from the act 1661 of any force: For since it needed a special statute to oblige apparent heirs, getting eases, to communicate them, or (which is all one) that they should be redeemable upon payment of the sum transacted; why should that law be extended to give rule to a statute made thirty-four years after, when the statute itself is silent?

To the *second* it was answered, The case of executors does not apply. The pursuer wrests the words of the act, as in every respect an heir *cum beneficio* and an executor were similar; which is far from the truth. Where has the pursuer seen an heir served *cum beneficio*, finding caution? And is not the inventory in heritage to be given up in different records and different manner from that of moveables? As then in other things they differ, there is no reason that, from the words above cited, they should be equiparate, in being obliged to communicate eases. The words are indeed only intended to bring



a familiar example of the manner in which the service was to be perfected. As the pursuer's reasoning is not warranted from the words of the statute, neither is it from the analogy of the law. An heir and executor are perfectly distinct; an heir is by *succession*, not by *office*; an executor, by his very name, denotes an *office*, and the same as *administrator*. Should it then be granted, that an executor in every case were obliged to communicate eases, which is not proved by the decision, which was not in the case of an executor *qua* nearest of kin; it would be perverting the analogy of law, to draw an argument from an *office* to a right of *succession*, to make one a trustee who neither by name or the nature of the thing, can be considered as such.

Beside the general point, the pursuer urged this argument, That the defender had not taken a conveyance of the adjudications, but only a discharge. Now, as he had not these adjudications in his person, he could claim nothing under them; and as heir *cum beneficio*, he could not dispute with any creditor, while any part of the inventory remained with him; at least not till he should show the value thereof exhausted by lawful debts.

In answer to this, it was alleged to be the same, whether an heir take an assignation or discharge. An assignation in the person of a debtor is virtually but a discharge, because *confusione tollitur obligatio*: So that the use of an assignation is not to make up a title, but the same with a discharge, *viz.* for a proof and evidence, the heir has discharged and satisfied so many of the debts for which there was credit upon him, to the value of the inventory; and if he can instruct so many debts are satisfied by him as exhaust the full value, whether the instruction be by his taking assignation or discharge, it makes no difference.

"The Lords found, That an heir *cum beneficio inventarii*, is obliged  
"to communicate eases."

N° LXVI.

18th January 1726.

JANET, JEAN and WILHELMA NISBETS *contra* NISBET of DIRLETON,  
their Brother.

*The Wife accepting a voluntary instead of her legal Provision, the Moveables receive a bipartite Division betwixt the Legitim and Dead's Part, equally as she were removed by Death.*

THE deceased William Nisbet of Dirleton, in his contract of marriage with Mrs Jean Bennet, his second lady, provided her  
"To a life-rent-annuity of twenty-six chalders ten bolls victual, which  
"she accepted in full satisfaction of terce of lands, third of moveables  
"or others which she might claim by law, in and through her said  
"husband's decease." In the same contract, "he obliges himself,  
"his heirs and successors, to make payment to the daughters of the  
"marriage, if three or more, the sum of 60,000 merks:" And the  
term of payment is after the said William Nisbet's decease, at their  
respective ages of eighteen years complete, with annualrent, &c.

After



After the death of their father, Janet, Jean and Wilhe'ma Nisbets brought an action against the present Dirleton, as executo nominate, to account to them for the half of the defunct's free moveables, as their *legitim*. Amongst other defences, it was pled, That the legitim could in no event be more than the third of the free gear, seeing the defunct has left a relict as well as children.

In fortification of the libel it was contended, Though there both be a relict and children existing after the father's decease, if either the relict or children have accepted of a provision in satisfaction of their legal claim, the division of the free moveables falls to be bipartite, equally as where children only, or a wife only is left. The reason is, that the wife, children and executors of the husband, having each a right *pro indiviso* in the defunct's moveables; as this necessarily falls to make a tripartite division when they all concur, the same reason points out a bipartite division when but two concur: And it has no influence, that the not concurring happens through the death of the third party, or any other reason; because from the nature of the thing, each has a right to the whole subject, unless he is restricted by the actual concurrence of the two other parties. To enforce this, let it be considered, were it even possible, that the husband could acquire his wife's third, so as to add only to the dead's part, making it two parts, and the legitim one; yet, *imo*, The wife's acceptance in satisfaction is not a conveyance, but a *renunciation*; which, in as much as the wife's right is not a *jus crediti* against the husband, (whereby a renunciation might be pleaded as a consolidation of her share with his) but a right of division, which would need a conveyance, the consequence is inevitable, that her *renunciation* can have no other effect, but to increase the capital of the testament to be the subject of a bipartite division betwixt the *legitim* and the *dead's part*. But, *2do*, Supposing the wife's renunciation had been in form of a conveyance, it would have come to the same, from this consideration, that all acquisitions of moveables by the husband go to the common fund of executry, and at his death subject to the common rules of division above explained. Nor can there be any difference, whether the provision accepted in satisfaction, and upon account of which the renunciation is made, was out of the executry, or any other subject: For the case here is the same, as where a land estate is given to younger children, which they accept in satisfaction of their interest in the moveables; whose renunciation would have the individual same effect, as if they had got so much for their share out of the executry. In the *next* place, As the pursuers are well founded in the nature of the thing, they want not sufficient authority beside to influence a decision in their favours. In the instructions given to the Commissaries *anno* 1666, which they are ordered to observe in the confirmation of all testaments, the rules of division are laid down to the same purpose: Thereby it is appointed, That if the defunct was single, and had no bairns *in familia*, the whole free gear should pay *quot*; that if he left both wife and bairns *in familia*, the testament should divide in three parts, and the third part only pay *quot*; that if he left a wife and no bairns, the testament should be divided in two, and the half of the free gear pay *quot*: And that the same division should be observed, though he left bairns behind him, if they were



were all *forisfiliate*. Now, though the case of children *in familia*, and a wife who has renounced her share, is not here expressly mentioned, it may readily be gathered from analogy; for since children non-existing and *forisfiliate* are put upon the same footing in these instructions, there cannot possibly be a solid reason given, why the determination should be different, whether the wife be dead, or if she has accepted a conventional instead of her legal provision: Which will be evident from this consideration; let the children's right be supposed either a right of *division*, which the pursuers contend it is, or only of *credit*; still the renunciation of the wife can never operate more in the husband's favours, than the like renunciation from the children. But not to dwell upon authorities by way of analogy, where they are to be had expressly upon the point, see *act 19. Parl. 1669*, where it is statuted, "That the Commissaries admit of no divisions in testaments, in favours and upon account of the relict, where, by her contract of marriage or otherwise, she is secluded from all part of her husband's moveables." Now, as this was consequential to the instructions of the Commissaries 1666, so it was in exact conformity to the analogy of our law and practice: For it being admitted, that where the law secluded the relict from any share in particular moveable subjects, as the *act 1661* does with respect to bonds bearing annualrent, the division was bipartite as to these subjects betwixt the dead's part and children's part; there was the same reason for the like division, where the wife's interest was, in virtue of her own paction and agreement, excluded by a solemn marriage-settlement.

The answer for Dirleton was as follows, Where a husband gives his wife a provision in satisfaction, the greatest part whereof is commonly out of his heritable estate, the rational meaning is, that the husband has purchased his wife's claim, for a valuable consideration, to the effect he may have the more ample disposal of his goods: For no man is presumed to tie down his own hands. As this must be presumed Dirleton's intention in his contract of marriage, the method he chose was very proper for that end: For let it be considered, that the wife's renunciation or acceptance of the provisions in the contract in satisfaction, was not an *extinction* of her legal claim; her right in the communion still was subsisting at her husband's death; and she was entitled to draw her share in opposition to the children, though not in opposition to the husband's executors, who had a *personal* objection against her arising from her contract of marriage, wherein she had renounced her right in the moveables, not indeed *absolutely*, but in favours of her husband: And the husband's executors take the wife's share, not as a conveyance from her, but in the defunct's right, just as they take the whole when none concur. Whence it is, that this being a *personal paction* betwixt the husband and wife, the children cannot found upon it, and can draw no more than if such a paction had never been made. And as a further evidence, that a renunciation in such a case, does and must operate only in favours of the husband, it cannot be doubted, but notwithstanding such a clause in satisfaction agreed to by the wife, the husband may discharge it, and declare that she shall come in for her third: Which he could not do, if there was a *jus quæsitum* to the children; nor could the dis-



charge restore her, if there was any *absolute extinction* of her right. It cannot have influence, that the renunciation was in the contract before the marriage, and before the wife had any interest in the communion of moveables; whence it might be argued, that by her contract she had debarred herself from ever having any interest: For as it was not the design to increase the common fund for the childrens behoof, so the *personal* paction in favours only of the husband was no *absolute* exclusion of her legal interest, more than if the contract had been after the marriage, and after her *jus quasitum* in the moveables. It is said, "That the childrens renunciation does increase the common fund of moveables in favours of the wife, and that there is the same reason the wife's renunciation should benefit the children." But it is doubted, whether it be law or be reasonable, when all the children renounce their legitim, that the wife must have half of the executry. It is not established in practice, or expressly said by any of our lawyers; and before this be established, it would be necessary to give an example, where the wife is preferred to the half of the executry upon the childrens renunciation, notwithstanding a testament by the defunct disposing of the moveables otherwise: And indeed there seems to be no good reason for it, since the father can notwithstanding such renunciation admit the children, if he pleases, to be *bairns in the house*; which shews that the renunciation is in his favours. Thus then upon the whole, there are three persons to whom the law has given a division in the moveables; and if any of them by a deed have barred themselves from the benefit of that division, the person in whose favours the deed was made can alone have benefit thereby. To come now to the authorities adduced for the pursuers, it cannot be admitted, that either the instructions or act of Parliament, determine any thing about the extent of the respective interests in the communion of moveables; they are calculated without any other view, but for ascertaining the extent of the *quot*, which was the bishop's share. And of this there is good evidence from Lord *Stair*, who though well acquainted with these instructions published by himself, with the act of Parliament, and with the method of division that was practised by the Commissaries; yet he in his *Institutions*, states this point as dubious and undetermined, namely, "Whether the childrens renunciation of their legitim, would give any benefit to the wife, or entitle her to any more than a third of the free moveables," l. 3. t. 8. § 46.

Replied for the pursuers, There is no more presumption, when a husband provides his wife out of other funds, that he intends to exclude the children from any benefit of her third of moveables, than when he sells land, that the children should be excluded from any share in the price; the cases are precisely equal: In a word, if this presumption take place, the children and relict also will be understood as excluded from every acquisition of moveables made by the husband: But there is no such presumption; the husband does not tie down his hands, by increasing the common fund of executry; as administrator, or rather in some respects as *dominus*, having an ample power of disposal during his life. And in the present case, there is no presumption, that Dirleton intended to exclude his children from his lady's share of the moveables; since this he could do at any time,  
if



if he should be so minded, by bestowing it upon land, or by restoring his lady to her legal right in the moveables; which he could do, though her renunciation was *absolute*; the children having no title to object, amongst other reasons, for this particularly, that they are thereby in no worse condition than if the renunciation had not been made. And this will serve to remove the difficulty, drawn from the husband's power of discharging the renunciation, as if in consistency with that, the renunciation could not be absolute, but only in his favours. To go to another point, The defender in his answers, is obliged to maintain, that the act above cited, was introduced only to ascertain the bishop's *quot*: But even that will be found a sufficient concession for the pursuers, because these are convertible terms, "What-ever is dead's part pays *quot*, and *quot* is payable out of nothing" but what is dead's part:" If therefore there is an indisputable rule from the law, for establishing the *quot*, that points out the dead's part, and that of consequence ascertains the other proportions of the executry: Thus wherever *quot* is paid for the half, it is certain the other half must belong to the bairns part, or to the relict; if the bairns have no claim, through their non-existence or forisfiliation, the relict has it; and where the relict has no claim, cut off by her paction or death, the bairns must have it. And this clearly excludes the notion, that the dead's part may be two thirds, and the bairns part one third; for if this could obtain, the act of Parliament must have enjoined, that in case of the wife's renunciation, the testament should be tripartite, whereof two shares to the dead's part, in his own right and that of his wife, for which *quot* should be paid, and the other third bairns part. But the quite contrary is established; the husband's moveables in that case is to admit of a bipartite division, wherein the wife's share, because of her renunciation, is not at all to be considered.

" The Lords found, The defunct's moveable estate admits only of  
 " a bipartite division, betwixt the children and the dead's part,  
 " by equal portions."

N° LXVII.

18th January 1726.

*Provisions to Children, unless so expressed, are not imputed in their Legitim, but they can draw both separately.*

**A**NOTHER defence pled for Dirleton, against his sister's claim of legitim, was, That they cannot draw both the legitim, and the 60,000 merks provided to them in their mother's contract of marriage; but the provision in the contract must be imputed *pro tanto*, towards the satisfaction of the legitim. Which was endeavoured to be made out, from the reason of introducing the legitim, *viz.* that children might not be unprovided. The law, for this end, has thought fit to settle a provision, and determine the extent of it; but where the father has given the child a sufficiency, and reasonable provision, the intent of the law is so far fulfilled, since the child has a proportion of his father's effects, equal to what the law intended him to draw. The legitim, therefore, being only a *subsidiary* claim  
 given



given by the law, in defect of other competent provisions, there is no place for it, where the children have already got more than the legitim; and if the provisions are less, being in its nature subsidiary, it can only come in to supply what is wanting of a competency; that is, in other words, the provisions must impute in the legitim *pro tanto*. Thus then the legitim, from its original design, is no more but a certain share of the moveables, including former provisions; and therefore, unless the father's *animus* do appear, that the former provisions shall not impute, the rule of law is that they do impute. This will not have the less weight that it is agreeable to the Roman law, whence our legitim is evidently derived. See l. 29. C. *Inoffic. Testam.* 2do, This is founded in the maxim, *debitor non præsumitur donare*, the father is debtor in the legitim, and what he gives must be understood in satisfaction *pro tanto* of that debt.

To the *first* it was answered, That the legitim is not a subsidiary claim; "it is that direct interest the children have in the communion of moveables, established to them by law and custom, abstractedly from any consideration, whether they are otherwise provided or not:" For thus far the law thought proper to make them absolutely secure, leaving them to their parents for what additions should be thought proper. The pursuers therefore are well founded in their action. As creditors in virtue of their mother's contract, they can draw their payment out of the common fund of the executry; and of what is left, after satisfying that and other just debts, they come in as children to draw the half, which is their legal provision. These two claims are perfectly consistent, and there is no more reason for imputing the one into the other, than if existing in different persons; and therefore in no case will a provision exclude the legitim, unless where the parent has expressly so determined. This reason is greatly confirmed from analogy of the wife's provision; for before the act 1681, a provision to a wife in a contract of marriage, would not have imputed in her legal provision; and to this hour, an obligation in a contract of marriage, to pay a wife a sum of money, will not impute in her third of moveables; the pursuers cannot see, why a separate provision in their favours, should impute into their legal provision, more than in the case of the wife. To the *second* it was answered, That the father is not debtor in the legitim, and therefore the maxim applies not. The legitim is a right of division, like the wife's third; it transmits without confirmation, and can be validly assigned the moment the father dies, while at the same time the other third, which is dead's part, is neither assignable, nor transmits without confirmation. But, 2do, Granting, for argument's sake, the legitim to be a debt, still it is no such debt to which the maxim can be applied. Indeed, where one is under a strict determined obligation, which the creditor has at any time in his power to enforce by legal execution, there every dubious deed will be interpreted as in order to dissolve the obligation; but every one sees that this has no relation to the case in hand. A father, whatever may be said of his being debtor in the legitim, is certainly under no strict obligation upon that account. He has notwithstanding the full and almost unaccountable administration and disposal of the moveables during his life; and the children must be satisfied with their share as he leaves it. This case



case therefore differs in every circumstance. *3tio*, Were this maxim applicable, there is a stronger presumption on the other side, that would take away its whole force, *viz.* the presumption of paternal affection, which has the effect, that bonds of provision to children are not even imputed in former bonds; see *Stair*, l. 1. t. 8. § 2. *med.* far less in the legitim.

“ The Lords found the provisions of the defunct’s contract of marriage in favours of his children the pursuers, must come off the hail head of the executry as a debt; and that what remains after payment of these provisions, and payment of the defunct’s other moveable debts, the children come to have right to the equal half thereof, as their legitim.”

The like was determined with respect to the relict’s third, in the case betwixt the Lady Balmain and Lieutenant Graham, December 1720; where the Lords found, that some donations of money and other moveables, made by the husband to his wife, were not imputable in her legal third.

N° LXVIII.

18th January 1726.

Competition DAVID MAXWEL and others, with ANDREW WARDROPER and others.

*The Furnishers for building have not a Hypothec upon the Ship.*

**D**AVID MAXWEL and others having furnished iron, timber, and other materials, to John Adamson for building a ship; and the ship, before it was fully completed, being sold at a public roup; a competition arose upon the price betwixt these furnishers, who claimed a preference as having a legal hypothec, and John Adamson’s other creditors, who had laid the first arrestments in the purchasers hands.

It was owned by the furnishers, that we have no positive law determining any *hypothec*, or even *privilege*, in favours of furnishers for repairing or building of ships. That *privilege* was originally founded in the Roman law; and thereafter, for the benefit of commerce, enlarged by the trading nations, and extended to have the effect of a legal *hypothec*: And agreeably to that practice, furnishers for *repairing* of ships have always, in the Court of Admiralty, been preferred to other personal creditors. But it was pled, Though hitherto there has been no precedent, wherein the preference of furnishers for *building* of ships has been determined; yet if it can be made appear, “ That by the Roman law, the furnishers for building of ships were in the same case with these who repaired; *2dly*, That trading nations give the same hypothec to the one as the other; and, *3dly*, That there is the same reason for both,” it is hoped their hypothec will be sustained, and they preferred to the creditors arresters. As to the *first*, By the Roman law, furnishers for the use of ships, whether for building or repairing, had no legal hypothec; but they had a privileged preference among the personal creditors, l. 34. *de Reb. Autb. Jud. possid.* l. 26. *cod.* This privilege, competent by the Roman law, was extended by the maritime powers to a legal hypothec. See *Vinnius*



*ad Peckium de re nautica, tit. ad leg. Rhod. l. Si quis ex vectoribus lit. B.* Where, treating of the privilege given to furnishers for repairing of houses, which was afterwards made a legal hypothec, it is added, "Hoc jus Accursius et plerique omnes eum secuti, ad eos etiam pertinere putant, qui in extruendam vel reficiendam, instruendamque navem pecunias crediderunt;" and several other Doctors of that opinion are there quoted. To these authorities, the furnishers shall add but one other, namely, the French edict 1681; which, as it contains the ordinances and regulations to be observed in all maritime cases, collected from and adapted to the practice of other trading nations, is a strong authority in such a case. The words, as they are translated by Mr Justice, book 1. t. 14. art. 17. are: "If the ship thus adjudged has never made a voyage, the carpenters, chalkers, and other artificers employed in building her, together with the creditors for the wood, ropes and other things furnished for the ship, shall be preferred to all other creditors;" which is a regulation answering precisely to the case of the present competition. Passing now to the third point, The reason of introducing this hypothec, must be admitted none other, than for the interest of the commonwealth, and the benefit of commerce; therefore it is that furnishers for building of ships are entitled to it, since it cannot be pretended the repairing an old decayed ship is of so great use as the building a new one. And it were indeed unaccountable, if the trading nations, who have found it so much their interest to encourage navigation beyond what was done by the Romans, and who for that reason have given a legal hypothec to the *repairer*, should give less encouragement to the *builder* than the Romans themselves; so as even to deprive him of his ancient privilege indulged in their law.

On the other hand, it was pled for Wardroper and the other creditors, That the above citations notwithstanding, the custom of trading nations has introduced no such legal hypothec as is contended for. A master of a ship, when abroad upon foreign voyages, is allowed to hypothecate the ship for security of materials furnished for her repair. Even this was introduced *ex necessitate*, because otherwise she might perish for want of help; it being impossible that a master can have personal credit every place where, by stress of weather, he may be forced to put in: And even here, it is still undecided, if the furnisher of materials for the reparation would have a hypothec, unless pactioned; and for this reason, masters in such circumstances are in use to grant a bill of bottomry upon the ship. But allowing a legal hypothec in this case, it will not follow, that one who has sold materials to the builder of a new ship, can plead the same privilege: For though it is of necessity that a crazy vessel be repaired, if she is to sail, there is no necessity for building a new one. Besides, when one sells to a buyer, having *larem et focum* in the place where the bargain was made, there is no sort of presumption that the goods were sold in any other than the ordinary way of merchandise, *sciz.* upon personal credit. And this leads to some specialties in the present case, that the hulk was not fully finished, and the ship never launched nor water-born. Here the general rule ought more especially to take effect: For had she been ready to sail, it might be pled with some shew, what was furnished to her in that state



state should create a hypothec, seeing the furnisher could not trust to any diligence of arrestment, having no security that the ship would not sail the next minute; whereas, while she remained fixed upon the stocks, she was in the case of other wares, equally affectable by diligence: And no solid reason can be assigned for a tacit hypothec in this case, more than in a house, for money lent to the building thereof; and yet our practice admits of no such hypothec. This matter may be cleared from analogy of the law, in the case of a master of a ship, who being abroad prosecuting a voyage, if he borrows money upon bottomry, the owners will be liable for it to the value of the vessel; yet he hath no power to take up money in this way at home; if he does, he may bind himself and his share of the ship, but the owners will not be liable.

This hypothec given to repairers, can be founded in nothing but the necessity of the thing, which excludes the builder: For if the advantage to commerce were the determining rule, which is urged on the other side, this is so far from giving a hypothec to the builder, that it would exclude all hypothecs, being so many impediments to free commerce. It is remarkable what Averanius, a famous Italian lawyer, says on this head, p. 460. of his *Interpretationes juris*: “*Observandum enim est, (says he), quod si naves tacite pignori obligentur omnibus, qui vel ad naves fabricandas, vel reficiendas, vel armandas, vel emenda nautis cibaria, pecuniam crediderunt, facile eveniet ut a creditoribus detineantur; atque ideo libere navigare non poterunt commercii causa, ac maximum mercaturæ afferetur impedimentum.*” Taking the matter in this light; if we consider the genius of the law of Scotland, it will be still more in Mr Wardroper’s favours: Time and experience, the great reformer of laws, has taught us, that most part of the conventional and tacit hypothecs, introduced by the common law, were a burdensome nuisance, of great hindrance to commerce; and therefore justly rejected, especially in the subject of moveables; there being no records to ascertain purchasers of their danger: For which reason, we have a general practice to disallow of all sorts of hypothecs, without delivery of the thing impignorated; which excludes the furnisher of materials for building a ship, and would exclude the repairer also, were it not the necessity of the thing that preponderates on the other side.

“The Lords found, That the ship having been sold by public roup, in a process against the builder, before he had fully finished her, and that she was never launched or water-born; the furnishers of materials to the said incomplete ship, have no legal hypothec thereon; and therefore preferred Andrew Wardroper on the price of the bark libelled, to the furnishers.”



N° LXIX.

19th January 1726.

Competition MARGARET CHALMERS, with the other CREDITORS of Riccarton.

*The Act of Parliament 1696, reaches only Securities given for former Debts, not nova debita.*

**U**PON the 10th May 1700, Robert Craig of Riccarton granted bond, for 3600 merks, to Jean Innes, relict of Robert Chalmers, in liferent, and to Margaret Chalmers her daughter, in fee; and of the same date, for security and payment thereof, disposed to them an heritable bond for the sum of 5000 merks, granted to him by Gordon of Troquhain: Upon which bond, the disponees took infeftment the 12th June 1704, within sixty days of Riccarton's bankruptcy.

Against this disposition it was objected by the other creditors of Riccarton, That it was null upon the act 5. Parl. 1696, declaring "all voluntar dispositions, assignations, &c. granted by a bankrupt within sixty days of his bankruptcy, in favours of his creditor, for his satisfaction or further security, in preference of other creditors, to be void and null." Under which clause, it was pled, the disposition in controversy must be comprehended, because seisin was taken upon it within that space; and by the immediately following clause of the act, "all dispositions, &c. as to this case of bankruptcy, are only reckoned to be of the date of the seisin lawfully taken thereon."

Answered for Margaret Chalmers, Let it be supposed, that her transaction with Riccarton had been actually made within sixty days of his bankruptcy; nay, further, that she had lent her money, and taken the security, even after actual bankruptcy; the transaction falls yet to be sustained, because the first mentioned clause annuls not dispositions, &c. where money is instantly told down, but only where granted "in security or satisfaction of anterior debts, in prejudice of other creditors." And the difference lies here, that by new contractions, the creditors suffer nothing, because their debtor gets an equivalent in money for the obligation he subjects himself to, or the right he gives away; whereas, when one insolvent applies any of his funds to the payment or satisfaction of a creditor, he detracts so much from his other creditors, to whom he was equally bound, and thereby so far virtually counteracts his engagements; so that applications of this sort are truly invalid, through defect of power in the granter. And accordingly to this it has all along been determined, particularly 16th January 1713, Græme of Gorthie *contra* Campbell, where it was found, "That the indorsation of a bill, if for money presently advanced, fell not within this clause of the statute." Also the creditors of Orbiston *contra* Hamilton of Dalziel, where the Lords found "the qualifications alleged on the act 1696, not relevant to reduce a disposition granted by Orbiston to Dalziel, except in so far as the same was made use of, in payment or security of debts anterior to the disposition."

Replied



Replied for the creditors, If the words of the statute favour this distinction, the spirit and design is entirely against it. The clause declaring "dispositions with respect to bankruptcy, to be no better than if granted of the date of the seisin," if it has any meaning, must be designed to force creditors to take infeftment, that the circumstances of debtors be thereby open, and people know with whom they contract: And truly that creditor cannot be considered as altogether innocent of fraud, who looks on, and sees his debtor contracting a great bulk of personal debt, and enticing innocent people to their ruin; easy in the mean time, because he can take infeftment at any moment, and thereby cut his fellow-creditors out of that subject, upon the faith of which they trusted their money. If this be the design of the clause, there is no room for distinguishing new contractions, from securities granted for old ones; for *interest reipublicæ* that such also be made public. And truly this distinction has no reasonable foundation, unless where the deeds are executed after actual insolvency; in which circumstances, indeed, for the reasons mentioned above, there is good ground for it: But let it be supposed, while a debtor is yet entire, two heritable bonds granted, the one a new debt, the other a corroboration of a former personal debt; for what imaginable reason should it be, when the debtor many years afterwards becomes bankrupt, and both infeftments fall within the sixty days, that the one is sustained, and the other of no effect? It is evident the other creditors suffer no more by the one than the other; the one was no more negligent than the other, and their claims were equally onerous. And thus in the case betwixt Duncan and Grant of Bonhard, 12th December 1717, the question falling out anent an heritable bond granted for ready money, long before the bankruptcy, the Lords found, "That the bond was to be considered as of the date of the seisin; and found that the seisin being taken within the sixty days, is void and null as to the point of bankrupt, without prejudice to the personal obligation in the bond."

Margaret Chalmers duplied, If the design of the clause was, to oblige creditors immediately to take infeftment, it fell to be expressed in words like the following, "That all infeftments taken within sixty days of the bankruptcy should be null, where there was any *mora* upon the creditor's part in taking infeftment;" whereas the words are of a quite different import; the infeftment is not made *per se* null, the disposition or other warrant of the infeftment is only declared to be no better than of the date of the infeftment taken upon it: Supposing then that Margaret Chalmers's disposition had been granted within the sixty days, as a *novum debitum*, it falls still to be sustained by the other clause of the act, with the infeftment taken thereon.

"The Lords found the bond and assignation being granted at the same time, does not fall under the act of Parliament 1696."



N° LXX.

26th January 1726.

Competition Marquis of CLYDESDALE and Earl of DUNDONALD.

*Clause of Return.*

**T**HE estate and honours of the family of Dundonald being provided to heirs-male in the year 1716, John Earl of Dundonald having only one son, William, the last Earl, from whom he had no great expectation of issue, executed a deed, by which, "failing heirs-male of his own body, he obliges himself to provide and secure his estate in favours of Lady Anne Cochran his eldest daughter, and the heirs-male of her body; which failing, to his other daughters, in their order," &c. Earl William having died in his minority, without issue, the Marquis of Clydesdale, only son to Lady Anne Cochran, brought an action to have it declared, "That the heirs-male of the said Earl John's body having failed, he the Marquis, as heir-male of the said Lady Anne's body, was heir of provision to the said Earl his grandfather; and craving that the present Earl of Dundonald might be decerned to make up his titles to the estate, and convey the same in his favours." On the other hand, this Earl of Dundonald, the heir-male of the family, brought a counter action of declarator by way of defence; among other conclusions, insisting that it might be found, "That William first Earl of Dundonald having conveyed his estate to heirs-male, with a clause of RETURN to himself failing heirs-male, this imported a prohibition to alter; and therefore the said Earl John had no power, by a gratuitous deed, to alter the conveyances and course of succession which their ancestor had established for the preservation of his name and family." These conveyances stood thus: The said William first Earl of Dundonald, by divers deeds, in the years 1653, 1656 and 1657, settles his estate upon "William Lord Cochran his eldest son, and the heirs-male of his body; whom failing, to return to himself." And in the year 1680, by a procuratory of resignation, and 1684, in his grandson's contract of marriage, the same Earl William, after the decease of his son, renews the settlement "in favours of John Lord Cochran his eldest grandson, and the heirs-male of his body; whom failing, to William Cochran of Kilmaronock, his second grandson, (father of Thomas the present Earl) and the heirs-male of his body; whom failing, to his other grandsons; whom failing, to himself; whom all failing, to the eldest heir-female of his own body, without division."

From these deeds it was pled for the Earl, That where a maker of an entail divests himself of the fee, and substitutes himself to his own donees; such substitution being purchased at no less value than the whole subject, is in the strictest manner onerous, and consequently unalterable by any of the intermediate substitutes in prejudice of the maker. If one should give a sum of money to the maker of a tailzie, to get himself put into the substitution, such substitution would be onerous and unalterable in prejudice of him who



who gave the consideration for it: And is not the intention as strong, when a man gives away his estate, with a provision of return to himself in a certain event, that the same should not be arbitrarily disappointed, as where he had only contributed a small matter for being named a substitute? To confirm this, see 31st January 1679, Drummond *contra* Drummond; 10th December 1685, Mortimer *contra* College of Edinburgh: In which cases, though the substitution was in money, and not in lands, it was found, that the institute could not alter in prejudice of a clause of return; and the *ratio decidendi* was purely the onerosity of the substitution, which equally applies to all estates, whether in land or money. And in a late case betwixt the Duke of Douglas and Lockhart of Lee, in a land-conveyance, a return to the tailzie was found to be an onerous substitution, not to be gratuitously altered.

It was allowed by the Marquis, That the Lords in some cases have made a distinction betwixt a clause of return and a simple substitution; that a clause of return was something stronger, and yet not the same with a prohibitory clause: But it was contended, that the Lords never found this in any case where an estate was provided to an heir *alioqui successurus*; which failing, to other heirs; which failing, to return to the granter, &c. Indeed where an estate is given away to a stranger, or one not *alioqui successurus*, with a limitation to particular heirs, and a provision of return to the granter; this has been explained to have the force of a paction betwixt the granter and the stranger receiver of the estate, that failing the heirs in the limitation, the estate should return to the granter. And this is most just, because where a proprietor makes such a deed, it is evident he is not settling his succession, but is giving away his estate from his successors for a particular use; and this reasonable condition is implied, that *causa cessante, cessabunt effectus*, when that use is at an end, that himself or his righteous heir shall have back the estate. And this cannot be better illustrated, than from consideration of the late case betwixt the Duke of Douglas and Lockhart of Lee, cited for the other party: There a part of the family estate of Douglas, being given away to the heir of a second marriage, and the heirs of his body; which failing, to return to the right heir of the family of Douglas; the Lords did justly interpret, "That that clause of return was not a simple substitution, but was of the nature of a paction betwixt the family and the heir of the second marriage, that failing him and his heirs, (in support of whom alone the estate was given) the estate should come back to the family:" There is therefore a wide difference betwixt this case and every case where a man is settling his estate upon his own heir. In all such cases, the last substitution being by way of a clause of return, there is no conveyance for a certain use, no implied condition; it is no more than a common expression, pointing out whom the proprietor intends should be his heir, failing such another; still leaving every substitute in his full right of property and power of disposal. It is to no purpose therefore to insist upon the onerosity of such a clause of return: There is no question the maker of a tailzie, disposing his estate to his heir *alioqui successurus*, since he might retain it to himself, can make it return upon what conditions



tions he pleases ; but where his principal design is confessedly that only of pointing out the succession of his heirs, can any secondary intention be drawn from a clause of return importing a limited tailzie ? The Marquis's lawyers beg leave to say, the presumption lies on the other side ; since the Earl of Dundonald made no use of the known irritant and resolute clauses calculated for the restriction of property, that he designed only a simple destination, and had no view to limit his successors. Taking the matter in this view, the decisions cited for the Earl will be found nothing to the purpose, they being in relation to sums of money given as provisions to children, and consequently grants for a particular use ; which use being at an end, the intention was obvious, that the sums should cease to be due : So that bonds of this nature are understood to be so far personal, that they go not to gratuitous assignees.

It was urged in the *second* place for the Marquis upon this head, That whatever effect a clause of return may have with regard to the persons in whose favours conceived, it can operate nothing in favours of the intermediate heirs who are called to the succession before these persons. Now let it be granted, there was the strongest security in favours of the Earl of Dundonald's heirs whatsoever, what is that to the heirs-male ? Is there any thing thereby stipulated in their favours ? or is it a tenable point, because the Earl took care to tie down his son, and the heirs-male of his body, not to dispose of the estate to a stranger in prejudice of his heirs of line, that therefore his son, or any of the subsequent heirs-male, could not better the case of the heir of line, and give him the succession sooner than the Earl had stipulated ? This is the very case : The Marquis of Clydesdale is the heir whatsoever, the very person in whose favours the return is conceived ; how then can it be said, that the deed in his favours is in prejudice of the clause of return ? and if not in prejudice, how comes the clause to be made a foundation upon which to reduce it ?

To this it was replied for the Earl, " It is a principle, Wherever " a substitution is onerous in favours of the last termination, it " gives the force of a *fideicomiss.* to the whole destination." If which were otherwise, this absurdity would follow, that the substitute who was made preferable in the succession, would have a weaker right than he who was called after him : Besides, that the matter could not otherwise be expedited ; for when the gratuitous alienation is made, it is probable the onerous substitute may have no title to quarrel it, many being before him in the right of succession ; and when perhaps after a long tract of time, the succession is open to him by the failure of the intermediate substitutes, they themselves being all the while out of possession, he has but a slender lay that this shall turn to his account, when in all probability the provision of return is quite forgot, or cut off by prescription in favours of third parties.

" The Lords found, That neither the clause of return in the con-  
 " tract 1653 and 1656, nor the substitution in the procuratory  
 " of resignation 1680, or contract of marriage 1684 years, did  
 " disable the last John Earl of Dundonald, gratuitously to alter the  
 " succession by a deed in favours of his daughters, in prejudice  
 " of the heir-male of the former investiture."



N° LXXI.

26th January 1726.

*A Minor even with Consent of Curators, cannot alter the Settlements of his Estate.*

**A**NOTHER head of the Earl's declarator was to this purpose, that at any rate the deed in the 1716 falls to be set aside, in respect that the last Earl William in the 1725, with consent of curators, made a new deed of settlement in favours of the present Earl. Against which deeds in the 1725 it was objected, that they were done on death-bed, and in minority; either of which was sufficient to set them aside.

It was pled for the Marquis, It is a received maxim in our law, that a minor, even with consent of curators, cannot prejudice his heir, or gratuitously alter the settlements made by his predecessor. Sir George Mackenzie in this matter is express in his Treatise of Tailzies, where he says, "It hath been doubted if minors can make tailzies, even with consent of tutors and curators: And I conceive they cannot; for though it cannot be properly said that they themselves are lesed, seeing they continue still fiars; yet a minor may be justly said to be lesed, in that he wrongs his family and nearest relations."

In support of the deed it was pled for the Earl of Dundonald, It is the known law of Scotland, that a minor with consent of curators, or by himself where he has none, has the same power over his estate, as if he was of full age; under this single exception, "unless the minor himself is lesed by the deed." The original of the maxim, that a minor cannot prejudice his heir, comes from this, that generally speaking these two go together, a lesion to the minor himself, and a lesion to his heir and family. Now in the present case it happens to be quite otherwise; Earl John the minor's father intended to disinherit the present Earl of Dundonald, while at the same time he was his representative both in name and honours; which was the most irrational action of that gentleman's life: A deed, which had he been minor when he did it, he could have reduced on the head of lesion, granting it otherwise unalterable. Is it not then unreasonable to maintain, that his son the heir of the family was lesed by the alteration?

Replied for the Marquis, The pretended favour of conjoining the estate and honours alters not the case: The settlement made by the predecessor is presumed in law to be the most advantageous for the minor; and it admits no arguments against this presumption. Besides, there is another reason drawn from utility: For be it once introduced, that a minor, to whom the law ascribes a weakness of mind, may alter the deeds of his predecessors without a sufficient onerous cause, it will lay him open to such importunities, as may prove highly pernicious to his family; and therefore such importunities it is the common interest to guard against.

"The Lords found, That William last Earl of Dundonald could not in his minority, though with consent of curators, gratuitously make any alteration of the destination of succession contained in the said bond of tailzie 1716."

N n

N° LXXII.



N° LXXII.

26th January 1726.

*The Law of Death-bed takes place in favour of all Sorts of Heirs.*

**I**N answer to the other objection of death-bed, against the deeds made by Earl William in the 1725, and in support of these deeds, it was urged for the Earl, It is a principle indeed, That death-bed deeds are not good against the heir. But this will not apply to the present case, in respect that neither the Marquis, nor the Dutches of Hamilton his mother, were in any sense heirs to Earl William, whose deeds are craved to be reduced, 1<sup>mo</sup>, In that they could not been served as heirs of provision to him; 2<sup>dly</sup>, *Esto* they could, yet an heir of provision, who cannot serve in the subject, is not such an heir as in law is entitled to the privilege of death-bed. To make out the *first* point, Earl John is not obliged, by the bond of entail 1716, to resign in favours of himself, whom failing, in favours of Lady Anne; but he directly obliges himself to resign to Lady Anne. By this clause she was stated a proper creditor, and by no means heir: There was nothing in the person of the granter, which she could carry by a service, in the event the obligation was to take effect; and it is evident, where there is no service, there can be no heir. But then as to the *second* point, *Esto* Lady Dutches could have served heir of provision, yet by the original constitution of the law of death-bed, and by the records as far back as they are to be found, an heir of provision has not this privilege, but singly the heir of the investiture, or, in other words, the heir in the subject alienated. This is distinctly held forth by our learned countryman *Craig*; who, after he has told us, on the subject of death-bed, that *in lecto ægritudinis nemo potest hæredi suo præjudicare*, when he comes to explain who it is that can succeed as heir, *L. 2. Dieg. 13. p. 225.* his words are, *Apud nos, hæres is solus est, qui in feudum rerum immobilium, aut rei alicujus immobilis succedit*; and afterwards, *p. 230. Nemo proprie hæres dicatur, nisi qui à lege ad successionem vocatur; sunt enim qui non ex lege, sed ex conventionem partium succedunt; sed hi nomen hæredis non merentur.* And surely, as there is no reason for extending this law in the general, there is much less in this particular case: The deed complained of, is a deed altering a former; which former was, in the eye of the law, a lesion prejudicial to the granter and his family: And as the law of death-bed was introduced for preventing impositions and abuses to the ruin of families, would it not be a most irrational decision, that the deed of a successor, rectifying a ruinous conveyance made by his predecessor, should be reduced upon the same ground of law, on which the deed itself whereby the ruin came could have been reduced?

Replied for the Marquis, That there is no distinction in the law of death-bed, betwixt a right of a person that is heir in virtue of a personal deed, and him that is heir by an investiture completed with investment. *Craig* indeed points at a distinction; but his opinion on that head has been exploded, and justly. The foundation of the law of death-bed was, to prevent persons being imposed upon, by the importunities not only of priests, but of near relations, at a time when through weakness they are presumed not capable of resisting solicitation,



tion, to alter the succession in prejudice of those persons, who during their firm health were the true heirs, to whom the estate was by law to descend, by whatever title, as heirs, whether of line, male, conquest or provision; and without distinction, whether they were heirs in virtue of a personal deed, or a deed on which investiture followed. And as this is established by constant practice, it is unnecessary to take notice of any other decision, than what passed in the case Hepburn of Humby *contra* Hepburn, 25th February 1663; where there are three points determined, every one of which destroys the objection made in this case. The *first* is, "That the pursuer of the reduction had a good title, though he had only a personal provision in his favours, conceived in a contract of marriage upon which no investiture had followed:" And the reasoning there was precisely the same that is now made use of for the Earl of Dundonald. *2do*, It was determined, "That the law of death-bed did operate in favours of an heir-male, by virtue of a personal provision, even in prejudice of the heir of line, who was heir of the investiture:" How much more in favours of the heir of line in prejudice of a collateral heir-male? And *3dly*, It was determined, "That though the right of the heir-male arose only from the deed of the defunct, who had made a disposition in his favours to the exclusion of the heirs of line, and had reserved a power to alter; yet that alteration could not be made on death-bed, to the prejudice of that very person whom the defunct by his own deed had created heir." And if it be said that this case was settled betwixt the parties, let it be considered what Lord Stair takes notice of, That the Lords were mostly of opinion that these points were law in every case.

"The Lords found, That William last Earl of Dundonald could not on death-bed, gratuitously make any alteration of the destination of succession contained in the bond of tailzie 1716."

N<sup>o</sup> LXXIII.

26th January 1726.

1. *Prescription.* 2. *Base Investiture.* 3. *Titles to a hæreditas jacens cannot be made up, otherwise than by a Service to the Defunct.*

ANOTHER head of the Earl of Dundonald's declarator was to this purpose, "That in so far as concerned certain parcels of the estate, the gratuitous deeds of alteration" (under which the Marquis claims) "must be declared ineffectual, as granted by persons who, with respect to these parcels, were only in the state of apparent heirs." The matter stood thus, William, first Earl of Dundonald, in his son the Lord Cochran's marriage-settlement, disposed to him and the heirs-male of the marriage, the lands of Dundonald, Ochiltree, Cochran, &c. in virtue whereof, the Lord Cochran was invested in these lands. Again, in the year 1656, there was a contract of excambion betwixt the Earl and his son, by which his son redispensed to him the lands of Ochiltree; in lieu whereof the Earl dispensed to his son, and the heirs-male of his body, &c. the Lordship of Paisley, and lands of Glen, in virtue whereof the son was thereafter invested. After this there were certain other lands purchased by the



the said Earl William, to himself in liferent only, and to the said Lord Cochran, and the heirs-male of his body in fee: And though all these several lands were thus habily vested by infeftment in the person of the said Lord Cochran, and the heirs-male of his body; none of the latter Earls, descendants of the Lord Cochran's body, made up any title to these infeftments: To which therefore it was pled, that the present Earl of Dundonald, as the nearest heir-male of his body, has the only right.

Objected to this in the *first* place for the Marquis, That in as much as William the first Earl of Dundonald, had in the year 1680 resigned the said lands wherein his son died infeft, in the hands of the superior, for new infeftment thereof to John Lord Cochran his grandchild, in virtue whereof he was infeft, and on the footing of which infeftment the family have possessed downwards to the death of Earl William in the 1725; therefore any claim the present Earl could have as apparent heir of the infeftments, which stood in the person of William Lord Cochran his grandfather, was lost both by the negative and positive prescription.

Answered for the Earl, *1mo*, Were there otherwise *termini habiles* of prescription, of which afterwards, it could only commence from the death of the Earl, whose liferent was reserved in the several conveyances, because the Lord Cochran could not sooner begin to possess, without which there can be no positive prescription: Now, he having deceased no sooner than November or December 1685, the forty years had not expired when the present Earl brought his action of declarator. *2do*, As to the negative prescription, though there had been possession from the 1680, still the years of William the first, the liferenter, behoved to be deduced; because, while he lived, the present Earl, heir of the Lord Cochran's infeftments, was *non valens agere*: And the Lords have found in a course of uniform decisions, that prescription cannot run against the fiar during the life of the liferenter. In the *next* place, there can be no negative prescription in this case, because, as well that title to which the prescription is ascribed, as that title under which the present Earl claims, were both in the same person: For as John Lord Cochran was infeft upon the settlement 1680, so he was apparent heir of his father's infeftment, and possessed by virtue of both titles; and upon this medium the argument for the Earl of Dundonald goes yet higher, that no prescription could run but from the death of Earl William last deceased, who was the apparent heir of the Lord Cochran, and in possession of his estate.

Replied, Earl William's lifetime and possession can never be deduced to stop the positive prescription: For, *1mo*, He was infeft in the years 1659 and 1662 publicly in most of all the estate, by a charter to himself and his heirs whatsoever, which was inconsistent with the settlements in the deeds 1653 and 1656; and therefore it may be, and is contended, that the prescription began even from the 1662: For from that time it was competent to the heirs-male to have quarrelled that infeftment made to the heirs whatsoever, and either to have reduced it, or to have obliged Earl William to denude; and since that was not done, every purchaser from the Earl of Dundonald can found upon his possession from that time, to complete the prescription in  
their



their favours, and are not concerned to enquire what liferents were given or reserved by former settlements: There is a charter and *seisin* absolute, which is all the act of Parliament requires; and now there is a possession of sixty years in consequence of it. In the *next* place, Supposing the possession did only commence from the 1680, the years of the liferent are not to be deduced, because the *fiar* and liferenter, both of them possessed upon the footing of the new conveyance, the public infestment that reserved Earl William's liferent; so that in place of his possession being deduced, it expressly accretes to the conveyance 1680, as being in virtue of the same infestment: In this case, the possession of the liferenter is plainly the possession of the *fiar*. As to the *second* part of the answer, That the Earl was *non valens agere*: 1<sup>mo</sup>, By the act of Parliament, this seems to be no objection to the positive prescription; otherwise the records can give no security. Persons can see who are infest, and who in possession; but they never can know who are *non valentes agere*: And indeed the objection seems to be competent by our law, against the negative prescription only. But *next*, the maxim is entirely misapplied; for if it be not, there can never be a prescription: Any heir starting up at the end of a hundred years, was in this sense *non valens agere*; the succession was not devolved on him; the fault was his predecessors, and not his; and non-existence would for sure be the strongest incapacity that could debar any heir. But this is not the meaning of the law: The incapacity must lie upon the person to whom the right does or might belong, during the course of the forty years; and therefore, if these persons to whom the right belonged during that time, were in a capacity to have interrupted the prescription, there is no place for the maxim. In this case, all the Earls of Dundonald from the 1680, were in a capacity to have interrupted. It is true, they choosed not to do it; and so much the stronger is the prescription, when it is fortified by an express consent, as well as by a negligence or inactivity for so many years.

Objected for the Marquis in the *second* place, to this head of the Earl's declarator, That William Lord Cochran's infestment in the Lordship of Paisley was only a base infestment, holden of his father the granter, not clad with possession, which was null by the law at the time; and therefore the posterior infestment, upon the surrender of the same granter in the year 1680, is the preferable right to the lands of Dundonald and Cochran, contained in the settlement 1653, and to the Lordship of Paisley, contained in the settlement 1656.

Answered, 1<sup>mo</sup>, That it was no nullity in base infestments, not to be clad with possession: For even before the statute 1693 they were to all effects valid rights, excepting only in competition with posterior onerous public infestments, or such base ones as implied warrandice first in possession: They were titles to force production of all infestments, whether public or private; they excluded posterior arresters; they excluded the terce of the granter's relict, and were good in competition with posterior gratuitous rights flowing from the same author; (see *Stair*, l. 2. t. 2. § 27. 27th January 1669, *Bell contra Rutherford*; *Spottiswood voce Kirkmen*.) All this is plain from the express words of the act 1540, which first introduced the distinction of base infestments, clad or not clad with possession: That act pre-



fumed, and statuted upon the presumption, that whoever took a base infeftment, and allowed the granter to retain possession, did the same *ex fraude* to induce a second purchaser to give a price for the lands; and therefore statutes, "That persons having such base infeftments, shall not be heard against a second heritable possessor, by any title which implies warranty." This is all the act provides, or needed to provide, there being no place for such presumption of fraud in the case of a posterior gratuitous infeftment. But *2do*, Base infeftments, not clad with possession, were always good against the heir of the granter, by an exprefs clause in the same statute 1540. Suppose then John Lord Cochran had served heir to his grandfather Earl William, he could not have quarrelled the infeftment; but he was in the same case as if served heir, being liable *præceptione hæreditatis*, by accepting the disposition 1680, to fulfil his grandfather's anterior deeds. *3tio*, This base infeftment was a good right in the person of William Lord Cochran, even in competition with any posterior however onerous right, flowing from the granter; in as much as the granter having reserved his liferent, the liferenter's possession was in the eye of the law the possession of the fiar.

Replied to this last article, The Lords have found on the contrary, "That an infeftment by a father to his son, was not clad with possession by the father's possession, although he had a factory from his son, 10th July 1669, Gardener *contra* Colvil." And however it might be pretended, that if a third party should denude in favours of one in liferent, and another in fee, upon which deed a base infeftment followed, that in such a case the possession of the liferenter would clothe the whole base infeftment with possession, because the liferent and fee are one and the same right, originally constituted by one infeftment; and because the liferenter had no other infeftment in him, every person enquiring into the liferenter's possession, could ascribe it to no other title than that infeftment: It is quite another thing, where a father is infeft in the property, then infefts his son in fee, with a reservation of his own liferent, and continues his own possession: For there his possession is not by virtue of his son's infeftment, but by virtue of his own right, which he hath reserved in so far as concerns his own liferent and possession; and so that possession of the father does not lead any person to find out the infeftment of the son: Having seen the father originally infeft in fee, they naturally ascribe his title to that, and enquire no further. But indeed the matter in this case does not principally hang upon a *bona fides*: It is the nature of the thing determines the question; where a father reserves his liferent, his son's infeftment is not at all his.

It was pled for the Marquis in the *third* place, against this conclusion of the declarator, That the rights made to William Lord Cochran, by his father, were not fully completed, no public infeftment, but a base seisin only without possession had followed upon them; besides, that the Earl had not fully acquired in the rights to the estate in his own person: And therefore since the *dominium directum*, yea in effect the whole real right remained with Earl William the granter, and that John Lord Cochran was himself the heir, and only person to whom the right of these base infeftments could devolve, and who could complete these titles, or take up the possession by virtue of them;



them; it was optional to him, either to connect a right to these titles, and to insist against his grandfather to complete them, or to neglect those titles which remained so lame and incomplete, and to take a split-new right from his grandfather, in whom the radical right still continued: And since he choosed to do so, and did complete that new right by a public investment, no other heir coming after can set up these defective titles, in opposition to the new right 1680; which being granted, as said is, to the same person who was heir to these incomplete lame titles, did entirely absorb, and render them useless. And although this reasoning must hold absolutely, had the investments 1653 and 1656 both been completed *in suo genere*; it holds much stronger with regard to the lands now in question, lying in the shire of Renfrew, that are contained in the deed 1653; because the seisin upon that deed was not registered in the register appointed for the shire of Renfrew, but only in the shire of Ayr, within which other lands lie, not now in dispute. The analogy of the Lords their decisions goes a great deal further upon this point: They have sustained a wife's right to a terce, and a husband's right to the courtesy, where the husband or wife were invest upon a void title; upon this very foundation, That though the investment might be quarrellable, the husband or wife, as they were heirs to the bad investment, were heirs to the good; and though they possessed by virtue of the most lame, no heir could quarrel, because they might have taken up the good one; and it was the same by which they possessed, since the line of descent was one and the same in both. 2do, They have found that an apparent heir of an investiture might discharge the reversion of an apprising, so as to bar any after heir from quarrelling. These things were determined lately in the cases of Linton *contra* Blair, and Mader *contra* Mader. There is another case better known, and that is the case of the estate of Kincardin: That estate was sold for the debts of Earl Alexander, upon whose titles the right of the purchaser and so many creditors stands; Earl Alexander's title was not by service to his predecessors, but by an apprising led against his elder brother Edward, the undoubted proprietor; which apprising was liable to many objections; the grounds of it were lost, itself satisfied by intromission, numberless nullities in it: Yet, since Earl Alexander had acquired it, and made it the title of his possession, when at the same time he was the apparent heir of the investiture, the Lords would not allow Earl Alexander's son to pass by that right, or to take up the right of Earl Edward his uncle against it. But the present case is stronger than all these: Those titles were somewhat inconsistent with, and at best but collateral one to another. Here was only a lame title, which required a new deed of Earl William to complete it: It belonged to his grandson; and accordingly, without putting him to any trouble, he fully completed the right: Where is the defect in such a case: And here it may be further observed, that the conveyance in the 1680 being granted to the heir in those deeds 1653 and 1656, in pursuance of the obligations contained in these very deeds, the disposition itself granted to John Lord Cochran the grandchild, was of equal strength with, and did import a precept of *Clare constat*, when it proceeded from the same person by whom such a precept fell to be given. Neither doth this import any defect in our records: Every body that  
looks



looks into them must see, that the first infeftments were but base, flowed from Earl William, and by course did descend to John Lord Cochran; and consequently that the completing the titles, by the same Earl, in the Lord Cochran's person, which they likewise see in the records, was agreeable to, and no more than a full implement of the first deeds.

To which the Earl made this answer, It cannot be pled, that the Earl of Dundonald's resignation in favours of his grandchild, does convey what was not in the resigner's person, but in the person of his son, and after his death, *in hereditate jacente* of him. Neither does it in the least alter the case, that the superior's resignation in the present question, was in favours of the apparent heir of the vassal: For the apparent heir's taking infeftment on that surrender, gave him no more right to the property, than if made to a stranger; he became thereby superior it is true, but remained still but apparent heir as to the property: There was something more to be done to make a title to the property, he must thereafter have served, and infeft himself as heir to the vassal; or perhaps he might have done it, on a precept of *clare constat* granted by himself in his own favours; but without such infeftment, the property remained *in hereditate* of William Lord Cochran the last vassal, to be taken up by his next apparent heir, who is the present Earl of Dundonald. Nor are the known and fixed forms of transmission of property, whether *inter vivos*, or from the dead to the living, ambulatory and precarious, to be observed or not, as one pleases: They have their foundation on principles firmly settled, "that property cannot be conveyed but by infeftment, nor one "infeftment transmitted but by another." Neither does it make the least difference, though the base infeftment had not been clad with possession; still it was a right in the person of a deceased ancestor, whereof he was never divested; it remains therefore *in hereditate*, till an heir shall make up a title to it. Nor is the want of registration a solid objection; because it is not a nullity, but solely a ground of preference in a competition: Infeftments are notwithstanding real rights, and produce all actions which arise from real rights, though they may be defeat in a competition. See March 25. 1623, L. Dunipace; March 24. 1626, Gray; June 12. 1673, *Fa contra* L. of Pourie and L. Balmerinloch. 2do, They are always good against the granter and his heirs, which of itself is enough in this case: And the Lords found, 30th June 1705, Keith of Ludquhairn *contra* Sinclair of Diren, "That the assignee of an heir, who had served to "his ancestor infeft only by an unregistrate seisin, was preferable to "a subsequent heir, making up his title to his ancestor last infeft by "seisin on record." It might be noticed in the *third* place, That in some respect this argument is yet weaker than the former, of its being a base infeftment not clad with possession: For there was nothing to hinder John Lord Cochran to have registered his father's infeftment by warrant of the Lords, by which it had been as unexceptionable, as if registered within sixty days of its date, excepting only as to intervening competing rights; *Stair, tit. Compet. § 22.* But now admitting that William Lord Cochran's base infeftments had been void, as either not clad with possession, or not recorded: Nay admitting there had been no infeftment at all, but only



only a naked personal disposition in the person of William Lord Cochran, yet still unless a title had been made up to that personal disposition by some of the preceding apparent heirs, the present Earl must have the only title to that disposition, and lands thereby conveyed, notwithstanding the posterior gratuitous infeftment flowing to John Lord Cochran from his grandfather the superior. If the law stood otherwise, and that even a personal right could be passed over by the heir; or which is the case in hand, if John Lord Cochran could by law pass over his father's right, and complete a title in himself without noticing it: Then it is certain, that the acquiring a new right from his grandfather was no passive title to his father; so was our law before the statute 1695, and so is it still, if the heir past by has not been three years in possession: What then should have become of his father's onerous creditors? If his right was sopited by the new right taken from the grandfather, they were undone; for the acquirer was liable in no passive title, and yet the right was carried out of the person of their debtor: A plain consequence, if the law stood as the Marquis pleads it. But this the justice of the law would never suffer: For though the acquirer was not *passive* liable, he could be charged by his father's creditors to enter heir to him; and upon his renunciation, the disposition to the father could be adjudged. Is not that then a demonstration, that the surrender by his grandfather did not transmit his father's disposition? And if it did not, what can hinder the present Earl, who is the heir in that right, to take it up? It will not hold what is pled in the *last* place, That the disposition 1680 is virtually a *clare constat*. *Id agitur* by a precept of *clare constat* to transfer the infeftment of the ancestor; it is an infeftment given to the receiver *qua* heir; the direct contrary *agebatur* by the surrender 1680, *sciz.* to give a new right, as if no such infeftment had ever been: It cannot then be equal to a precept of *clare constat*, when in effect, though in other words, it bears, that *clare constat* there was no right in the person of William Lord Cochran at all. And it may further be observed, there is no right given to John Lord Cochran by his grandfather, but what might been given even in his father's lifetime; which therefore could never be a habile method of making up a title to the rights that were in his father's person.

“ The Lords found, That the procuratory of resignation 1680, and  
 “ charter and seisin following thereon, in favours of John Lord  
 “ Cochran, joined with the subsequent infeftments and possession  
 “ of his heirs, did not effectually establish, in the person of  
 “ the last John Earl of Dundonald, granter of the bond of tail-  
 “ zie 1716, the property of the lands and estate wherein William  
 “ Lord Cochran, son to the first Earl of Dundonald, died vest  
 “ and seised by either public or base infeftments: And repelled  
 “ the allegiance of prescription pled for the Marquis of Clydes-  
 “ dale, and also the allegiance of not registration of William  
 “ Lord Cochran's seisin 1653 in the register for the shire of Ren-  
 “ frew, and that the infeftments 1653 and 1656 were not clad  
 “ with possession: And found therefore, that the lands and  
 “ estate wherein William Lord Cochran died vest and seised, and  
 “ to which no title was made up by his successors, by service,  
 “ precept of *clare constat* as heirs to him, or by disposition from  
 “ him,



“ him, are yet *in hæreditate jacente* of the said William Lord Cochran; and that the present Earl of Dundonald may serve heir to him, in such of the said lands and estate as are settled upon heirs-male.”

N° LXXIV.

26th January 1726.

*An apparent Heir three Years in Possession.*

**T**HERE was a separate point insisted on for the Marquis, arising from the act 1695, by which an apparent heir, passing by another heir who had been three years in possession, is obliged to fulfil the deeds of that heir whom he passes by: Whence the Marquis insisted, That allowing the Earl of Dundonald to be apparent heir to William Lord Cochran, and that he can connect his title by a service; he must implement the deeds of the heirs who have been interjected between him and the said Lord Cochran, particularly the bond of entail 1716.

In answer to this it was contended, That the act of Parliament, subjecting the heir passing by to the debts and deeds of the intermediate apparent heirs, does not extend to *gratuitous* bonds of entail, or destinations of succession, made by such intermediate apparent heirs, and that it does by no means concern disputes among the several heirs, but singly such as arise between heirs and creditors; as is evident from the whole contexture and strain of the statute, especially when compared with the genius of our former law. It is inscribed in the Rubrick, an act “ for obviating the frauds of apparent heirs:” It proceeds upon the preamble “ of the frequent frauds and disappointments that creditors suffer upon the decease of their debtors, “ and through the contrivance of apparent heirs to their prejudice;” and for remeid thereof, statutes, &c. Here is the abuse intended to be redressed, *viz.* “ the frauds done to creditors upon the decease of “ their debtors;” and the statute ought not to be further extended, than in favours of those who were creditors to the deceased apparent heirs. The argument for the Marquis is laid singly upon the generality of the words *debts and deeds*. But as this is an extraordinary statute, contrary to the genius and analogy of all law, “ That one “ can by his debts or deeds affect a subject to which he has no title;” though so far as it goes, it must be binding, this much ought to be granted, that it is not to be extended. For this reason it has justly been made a question, if under the word *deeds* direct conveyances were at all comprehended: And it is believed the late decision in the case of Muirhead of Drumpark, was the first where it was so found. But then it proceeded upon this special ground, that being in a marriage settlement, it was an onerous deed: It was a *debt* on the granter, implying warrandice; wherefore the Lords thought such deeds fell under the reason of the law. It is material to observe, that the law requires a possession for three years by the intermediate heir, in order to make the heir *passing by* liable for these *debts and deeds*. The reason whereof can be no other than this, that *bonâ fide* contractors, by seeing a man so long in possession, were induced to believe he had completed



completed his title to the estate: For had the intention been, to enable him, even while he had no title, to alien the estate gratuitously, by a naked destination of succession, in prejudice of the next heir; what reason had there been for requiring a three years possession to capacitate him for this end? Would not the possession of one day been as good as the possession of a year, if it had been in the intention of the statute at one blow to overturn the firmest foundations of our law?

“ The Lords found, That the Earl of Dundonald, by serving heir  
 “ to William Lord Cochran, and passing by Earl John, maker  
 “ of the gratuitous bond of tailzie 1716, is not by the act of  
 “ Parliament 1695 obliged to fulfil the said bond of tailzie.”

N° LXXV.

End of January 1727.

*One passing by an apparent Heir three Years in Possession, and liable thereby to his Debts, has Relief off the apparent Heir's Representatives in any other Subject.*

**T**HIS question came afterwards to be debated betwixt the parties, Whether the present Earl of Dundonald, who enjoys the old estate as heir to William Lord Cochran his grandfather, who died last vest and seised therein, passing by the several intermediate Earls of Dundonald, who never made up the proper titles to that estate, but one after another possessed as apparent heirs of William Lord Cochran, shall upon the act of Parliament 1695 be bound to pay the personal debts contracted by the said apparent heirs, without relief against the Marquis their representative, who as heir to them enjoys their proper estate?

And it was contended for the Marquis, That he is only heir of provision in virtue of the deed 1716, and as such liable to the debts only in the last place, after discussing of other heirs; and that he has relief off these other heirs, and such as in the construction of law are liable as other heirs; which is the Earl of Dundonald's case in consequence of the act 1695.

Answered, The act 1695 was introduced allenary for the security of creditors, and to prevent their being disappointed of their money, where they contracted upon the faith of the apparent heir their debtor's being three years in possession; but by no means in favours of an heir, so as to give him relief of any debts to which he is liable *qua* heir served; nay it might even be thought a question, “ If the  
 “ creditor himself could have any benefit from the act, in such a case  
 “ where the debtor hath an heir served, on whom an estate hath de-  
 “ volved sufficient for payment of his debt.” But be in that what will, it is enough to say that the act of Parliament introduced only an accessory security for the creditors, and from a principle of equity made an estate, which really was not the debtor's, liable to his debt, because of his possession, and the *bona fides* of the creditor: But if the person to whom the estate truly belonged made the creditor secure, by paying him his money, there was nothing in law to hinder him to have his recourse against the proper heir of the debtor,  
 either



either for relief, or by taking assignation, and insisting in name of the creditor.

“ The Lords found the Marquis of Clydesdale obliged to relieve  
“ the Earl of Dundonald.”

N° LXXVI.

January 1726.

Mr ROBERT HEPBURN, Writer to the Signet, *contra* GEORGE RICHARDSON.

*The Master's Hypothec upon his Tenants Stocking subsists three Months after the Year's Rent falls due.*

**W**ILLIAM JAMISON had a tack from Mr Robert Hepburn, whereby he was bound to pay him a silver tack-duty for every year of his possession, the first half at Martinmas, the other half at the Whitsunday thereafter. George Richardson, a creditor of Jamison, upon the 10th June 1724, carried off his cattle and other stocking, by virtue of a poinding, leaving nothing on the ground but the fruits that were growing. Upon this Mr Hepburn, as landlord, intimated an action against the poinder; concluding, That he having intromitted with the pursuer's tenant's goods, though in virtue of a poinding, was liable for the whole rent 1723, the goods poinded standing hypothecated for that year's rent. The defence was, That there being a hypothec upon the stocking only for one year's rent, the hypothec for the year 1723 ceased at Whitsunday 1724; and the defender having poinded that stocking near a month thereafter, is secure. To which it was answered, Though the hypothec upon the stocking is but for one year at once, still, after the last term of payment of the year's rent, a competent time must be allowed to make the hypothec effectual to the master; which cannot be during the currency of the term, before the rent is due. Now, this time must depend much upon the discretion of the landlord; and neither reason nor custom has restricted it to so narrow a space as a month after the term of payment: Especially considering that it is the interest of tenants more than of masters, that it continue longer; for it is certain, if the hypothec be found to last but till the next day after the term, it will oblige masters to prosecute their tenants for their rents the very term day, which will be an intolerable rigour; and therefore as it is every where esteemed a well paid rent, when one term is discharged before another comes on, the hypothec ought to last till the term next following the term of payment of the rent.

“ The Lords found, That the master has three months after the  
“ term of payment, to do diligence upon his hypothec against  
“ his tenant and stocking.”

N° LXXVII.



N<sup>o</sup> LXXVII.

January 1726.

WALTER DENHOLM *contra* DENHOLM of Cranshaws.*Conditional Institute.*

**T**HE deceased David Denholm of Cranshaws, by a deed under his hand, bound himself to pay to his children therein mentioned, the sums following, *viz.* To David Denholm 2500 merks, to Walter Denholm 2500 merks, to Margaret Denholm 2500 merks, and to Jean Denholm 2000 merks, extending in all to 9500 merks; and that at the terms following, *viz.* one-half at the first term of Whitsunday or Martinmas after his decease, and the other half at their respective majorities and ages of twenty-one years: But with this proviso, "That in case of the decease of any of the children, before they attain to majority, and the age of twenty-one years, without being married and having children, the portion of the child deceasing should accresce to the surviving children, and be divided equally amongst them, the eldest son drawing a share with them." Jean Denholm the youngest child, having predeceased her father, without attaining to the age of twenty-one years, Walter Denholm brought an action against his eldest brother the heir, for a share of his sister's portion in virtue of the provision in the bond.

It was pled for the heir, That Jean having died before her father, as in the case of all legacies, her portion was never due, and consequently could not transmit to heirs and substitutes. Bonds of provision to children, payable at a certain term after the father's decease, or at the children's attaining a certain age, have always been looked upon as conditional, "providing they survive the period condescended on;" so that if the condition do not exist by their survivance, the provision and institution is entirely void: But where the *institution* takes not place, neither can the *substitution*; because a *substitution* has no subsistence without an *institution*.

On the other hand, it was contended, That Jean's provision, though she predeceased her father, ought to accresce to the surviving children, even supposing it a legacy, much more when it is a bond of provision and a conditional debt. To make out which, the defender insisted, that though in the common case of legacies left to any person *nominatim*, if the *legatee* die before the testator, he cannot transmit to his heirs the *hope* of legacy, which is all he has at his death; yet, that the person who *devises* the legacy, cannot substitute one to him, so as though the institute fail before the testator, the substitute shall take the legacy, is, he believed, founded in no law. And here the intention of the father is most enix; the words are absolute, "In case of the decease of any of the children before their majority:" And no doubt, this *case* or *condition* is purified, the children dying before their father as well as after; and the other children come in by force of the clause, whatever time that event happen before majority. Indeed, in this case it is not properly by way of *substitution*, that the children draw their share of the defunct's portion, but as *conditional institutes*; which condition is now purified:

Q q

They



They have no claim as *successors* to the defunct, they need no service to her; nor when they get her share, will they be liable for her debts. In all the clause, there is not a word that looks like a substitution or succession; the provision is, that one child deceasing, his or her share shall *acresce and be divided*: Had the father designed a *substitution*, he would not have forgot the words, *descend, succeeded by*, and such like; which are rather more common, and which appear to have been shunned of design. That there was here no substitution intended, will further appear from this circumstance, that the share of the person dying before majority was to go to the rest, which could only be as conditional institutes; for by way of substitution they could draw nothing? seeing by the childrens dying before majority, the condition could never be purified with respect to the institute, who never having had a right, none can be derived from him. The same reasoning will apply with rather more force in obligations than in legacies; and these provisions were truly conditional debts, not at all legacies.

“ The Lords found, That the provision of the predeceasing child,  
“ in this case, accresced to the surviving children.”

N° LXXVIII.

January 1726.

Competition CHARLES CRICHTON with JAMES GIBSON.

*Bill indorsable, though not bearing To Order.*

**I**T was disputed betwixt these parties, if a bill not bearing *to order*, was notwithstanding indorsable? And it was pled for the indorsee, There can be no more necessity to make a bill payable *to order*, than to make a bond payable to assignees; especially in this case, where the bill is betwixt two. In both cases, an effectual obligation is contracted of loan; they are both *nomina debitorum*, which are always assignable by our law. Perhaps there may be a difference, where a bill is taken payable to a third party: For there it may be argued, that the possessor of the bill is more properly a mandatar than creditor; and therefore if the drawer of the bill that remits the money, intends that his correspondent shall have the disposal of the bill, he adjects, *or order*: And it is thought by some foreign writers, that otherwise the correspondent cannot indorse the bill. This, it is believed, gave rise to the words, *or order*; which thereupon became common in all bills; but can never be necessary, where the procurer of the bill is the lender of the money, and the creditor himself.

It was answered, That when bills debord from the settled style and tenor, they have not the extraordinary privileges, which are given only to writs of a certain form by law and custom. It is not disputed, that the bill in question may be supported as a good ground of action, and be transmissible by assignation, having the common solemnities of law; but that it can pass by indorsation, which is an extraordinary privilege, will never be allowed. And this is the opinion of *Marius* and *Scarlet*, who maintain in general, without any distinction, that



that no man can effectually indorse a bill, but what is made payable to himself and his order.

“ The Lords preferred the indorsee.”

N<sup>o</sup> LXXIX.

1<sup>st</sup> February 1726.

Mr ARCHIBALD STEWART, Advocate, *contra* DENHOLM of Westfield.

*The provisions and irritant Clauses must be repeated in every Conveyance of the Tailzie.*

**S**IR WILLIAM DENHOLM of Westfield, in the year 1711, executed a bond of tailzie, whereby he “ resigns his lands and estate in favours of, and for new infeftment, to himself, and the heirs-male of his body; which failing, to the heirs-female of his body; which failing, to Robert Baillie, and the heirs-male of his body; which failing, to Mr Archibald Stewart,” &c. with strict prohibitory and irritant clauses. The tailzier having died without heirs male or female of his body, the succession devolved upon Robert Baillie *alias* Sir Robert Denholm; and no infeftment having followed upon the tailzie, which was never registered, he was served and retoured heir of tailzie in general, without inserting the conditions, limitations and irritancies in the retour. Robert Baillie *alias* Sir Robert Denholm, possessed the estate during his lifetime, and his possession was continued by his son this defender: Against whom the said Mr Archibald Stewart insisted in a declarator of irritancy, on this special ground, “ That the general retour above mentioned did not contain the conditions and clauses irritant insert in the said retour;” which was a legal irritancy introduced by the act 1685 anent tailzies.

Against which declarator it was pled, That this irritancy was introduced by the act, to protect entailed estates from the negligence or fraud of heirs, who by omitting to insert the clauses of the entail, left the estate open to their debts; and therefore can never be extended to the omission of heirs, whose estates would be subjected to the diligence of creditors, whether the clauses be insert or left out: But so it is that this tailzie, never having been registered, is not effectual against creditors, though the clauses had been insert according to the strictest interpretation of the act; whereby it is not by the heir's neglect or omission to insert these clauses, that the estate becomes exposed to creditors. 2<sup>do</sup>, Robert Baillie's retour is only upon a *general service*, whereas the irritancy insisted on relates to retours upon *special services*: Which is plain from the act, in which the clauses are ordained to be insert in the “ procuratories, precepts, charters, and instruments of resignation,” as well as repeated in the subsequent *conveyances*, besides the registration of the tailzie; and then adds, “ It being so insert,” &c. which can no otherwise be understood, than *insert* not only in the register of tailzies, and in the *conveyances*, but likewise in an infeftment, without which the tailzie is never completed: So that the repeating of the clauses can refer only to a special service, after the tailzie



tailzie is clothed with infeftment. And it will not be found, that any general service ever contained the irritancies of the right upon which the fucceffor is ferved: Nor is there need they fhould; for a general service was never a *title* to, or *conveyance* of an eftate; only gives right to an unexecuted procuratory of refignation, or precept of feifin, in order to expedite charters and infeftments thereupon; in which indeed the clauses irritant are to be repeated, but never in a general service. Which will be further clear from this confideration, that as long as the tailzie remains in terms of a perfonal right, there is no danger of the eftate's being carried off by creditors; becaufe they can never affect a perfonal right, but in the terms and conditions in which it ftands: So that it is the fame thing, whether the provisions be repeated in the general service or not; and therefore the law was never intended to reach perfonal conveyances of tailzied eftates, but only infeftments; which no conditions can qualify, but what are in the infeftments themfelves, or in the records.

Answered to the *first*, The import of the act of Parliament is plain: It gives authority to entails made under fuch irritancies as the maker pleafes; and in order to the entail's being effectual againft creditors, it appoints "the entail to be recorded, and the irritancies to be inserted, not only in the firft original infeftment, but in the after conveyances;" and thefe indeed are the neceffary requifites, without which no tailzie can have any ftrength againft creditors: But then the act goes further, and by a perfect feparate clause, in order to prevent the fraudulent eluding of the act, provides, "That notwithstanding fuch entails fhall not be effectual againft creditors without fuch requifites; yet as to the heir, in cafe the faid provisions and irritant clauses be not repeated in the rights and conveyances, whereby any of the heirs of entail fhall bruck and enjoy the tailzied eftate, fuch omiffion fhall import a contravention." It is true the law has not made the not recording of the entail an irritancy upon the heir, which juftly might been done, and which feems to be an omiffion in the act: But ftill without regard to that, the not repeating the clauses is made an irritancy upon the heir; fuch is the unavoidable letter of the law. But in the *next* place, Although the not registering the entail is not by the act made an irritancy, yet it is what is incumbent upon the heir to do, in implement of the will of the maker, who no doubt intended that the tailzie fhould be effectual againft creditors, which an unregistered tailzie is not. Now if the heir fraudulently, and contrary to the intention of the maker, do not register the entail, he can never profit by his fraud or neglect: and therefore, when the law has appointed two things to be done, one of them under an exprefs irritancy, the heir cannot efcape the force of the irritancy, or juftify one fault, *viz.* his not repeating the clauses, by alleging he hath been guilty of the other fault, *viz.* not recording the entail. And were it otherwife, there would be an end of all entails not registered in the life of the maker: The heir would have no more to do, but neglect recording the entail, and then pretend he is not bound to notice or perform any other part of the act. To the *second*, answered, The irritant clauses are indeed provided to be inserted in the infeftments; but that



that is in case there be infeftments; for if none, still to make the tailzie effectual againſt creditors, it muſt be recorded, and the irritancies repeated in the perſonal conveyances. The law here is expreſs, the words being, "Conveyances by which the heir bruicks "and enjoys the eſtate;" and perhaps this is the firſt time ever it was aſſerted, that a general ſervice is not a *conveyance*. Robert Baillie *alias* Sir Robert Denholm, poſſeſſed by no other; and however he might have purged the irritancy before he was quarrelled, by completing the infeftment, and inserting the irritancies, that cannot now avail the defender, ſince he never corrected his miſtake. *2do*, Where heirs do expedite general retours without inserting the irritancies, they take care not to bruick and enjoy by virtue of theſe retours, but firſt to complete their infeftments and then to poſſeſs; and in doing ſo, they fall not under the act, becauſe the words are, "Conveyances by which the heir bruicks and enjoys the "eſtate:" But in this caſe, Robert Baillie continued to bruick by virtue of the retour only, and ſo fell directly under the words of the act.

"The Lords found, That Sir Robert Denholm retouring himſelf  
 "heir of proviſion to Sir William Denholm maker of the tail-  
 "zie, without repeating in the retour the proviſions and irri-  
 "tant claules of the tailzie, and bruicking and enjoying the  
 "tailzied eſtate by virtue of the retour, does import an irri-  
 "tancy of the heir's right."

N° LXXX.

1ſt February 1726.

*Irritancies in Tailzies not purgeable.*

**I**N the next place, it was pled for the defender, that notwithſtand-  
 ing this irritancy incurred by his father, he the ſon ought to be aſſoiled from the declarator, *imo*, Becauſe the irritancy ſuſtained being wholly *penal*, without any damage accruing by the omiſſion to any perſon; the ſame not being declared in any proper proceſs againſt Sir Robert in his life, the action is not competent againſt this defender; it being a principle, that *penales actiones non tranſeunt in heredes*. *2do*, Suppoſing the action competent, yet as all other *penal* irritancies, it is *purgeable*, and the defender is willing to ſerve heir in proper form, and to engroſs all the irritant and reſolutive claules *per expreſſum*.

As to the *firſt*, That the concluſion inſiſted on for the purſuer is altogether *penal*, cannot well be denied: That the claules irritant and reſolutive were not engroſſed in the general retour, is attended with no manner of damage to the purſuer, though he ſhould ſucceed as heir of tailzie in the regular order eſtabliſhed by the entail; for the debts of Sir Robert, who never was veſted in the eſtate, or had further in his perſon than a perſonal right, affected with very expreſs prohibitory claules *de non contrahendo*, can never affect the entailed eſtate, nor any of the heirs of tailzie ſucceeding therein. It is an omiſſion without any fraudulent deſign; and if on this account the eſtate be forfeited, nothing can be more of the nature of a *pura pœna*. Had indeed this irritancy ariſen from any claule in the tailzie,

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something might have been pled, because all actions *ex contractu* pass against heirs; but being founded in the statute, it is plainly a penal law, which neither by the Roman law nor ours is effectual against heirs; which is *triti juris* in the case of vitious intromission, and there is the same reason here. As to the *second* defence, The nature of all penal irritancies is such, that they are purgeable before declarator, especially of these which consist in *omittendo*. And the circumstances of this case are particularly favourable; for it is certain, before the above decision, that omitting to insert the irritant clauses in general services, was never reckoned an irritancy. Now, it is a rule in law, That *juris error, ubi de damno evitando agitur, non nocet; ubi de lucro captando nocet*. See l. 7. & 8. *jur. et fact. ignoran.* And it were exceeding hard to make this decision upon a new point have a penal retrospect.

Answered for the pursuer to the *first*, That the question here is not upon any penal law or custom, but concerning the transmission of an estate from one to another, on account of non-performance of a condition of the settlement; which action does not arise from a delict, but from the will of the maker of the tailzie, who imposed that law, "That in case of such events, the succession should go from one person and devolve upon another." Nor does it alter the case that this particular irritancy arises from the force of the law, more than from the will of the tailzier; because it is nothing but a further declaration, in order to make the will of the tailzier more effectual; and which declaration every tailzier of consequence is understood tacitly to acquiesce in, and give authority to for that reason; and so the action upon this irritancy is no more penal, than upon any of the other irritancies insert in the tailzie. It is a condition on which the law has declared the estate shall go to the next branch of the entail. The present heir has it in his power to fulfil the condition or not. If he do not fulfil, he virtually renounces the estate, and makes way for the next branch; but that is neither crime nor delict, and consequently the action for declaring the effect of the condition is not penal. This will yet be plainer, if the very nature and name of the action be considered. The pursuer is now in an action for *declaring* the right of the estate to be in him; no penal action can properly be *declaratory* of the right of another, the effect is only to impose a punishment upon the delinquent; and the distinction is obvious, betwixt a sentence imposing a punishment upon a delinquent, on account of his commission of a certain fact, and another sentence declaring a right to have arisen to a third party, by and through either the commission or omission of such a fact: Yea, in several cases, the same fact may infer both consequences, and make way for both kind of actions; one for punishing the committer of the fact, the other for declaring a right that has accrued to some third party thereby: In which case, the action for imposing the punishment, could not be pursued but during the life of the delinquent; the other, any time within the long prescription. But the nature of all declarators of irritancy in entails, is to transfer the property, and no ways to hurt the contravener, except in consequence of the transference: And the like examples arise from the laws against Papists, and others of that nature, wherever, in certain events, estates are appointed to devolve from



from one person to another. From this it is evident, there is no similitude betwixt this case and vitious intromission, which arises alienarily from the delinquence or irregularity of the vitious intromitter, whose act of intromission without a title, is a culpable transgression of the national law; whereas there is no manner of vitiosity in neglecting or transgressing any condition or quality of the tailzie. The law has not declared it a culpable transgression in an heir to neglect inserting the irritancies in his titles; but gives him his choice, inserting them to preserve the estate, or neglecting them to lose it. But, in the *next* place, it is not the full and adequate reason why vitious intromission goes not against heirs, that the consequence has something penal in it; but as our consuetudinary law has established the penalty, so has it the restriction, "That the action shall not be pursued after the death of the intromitter;" because the titles of moveables not remaining upon record, it is next to impossible to know the intromitter's title; whereas in this case, it is directly otherwise, the record itself proving the incurring of the irritancy.

This makes also an answer to the *second* defence. For if this irritancy be not penal, then it follows not that it is purgeable; and there is great necessity beside, that irritancies in tailzies be not purgeable, because it would be a means of overturning the best constituted tailzies; for no heir would insert the irritancies in his infeftments till he were obliged by a declarator, which might be delayed long enough, by the non-existence, ignorance, want of ability, or even connivance of the posterior heirs of tailzie; and in the mean time the estate would be liable to be torn to pieces by creditors: And thus tailzies would seldom fail to be evacuated at some time or other. Taking the matter now in this view, that the irritancy is not penal, the favour pled for the defender will signify nothing; for though *error juris* will plead strongly to alleviate a punishment, it applies not where a *condition* has precisely fallen out, whether by accident or design, under which an alienation was made; for the *condition* existing, the *effect* must follow.

"The Lords found the defender cannot purge the irritancy."

N<sup>o</sup> LXXXI.

4th February 1726.

Competition the NEW COLLEGE of St Andrew's, with Sir ALEXANDER ANSTRUTHER's Creditors.

*Infeftment of Annualrent, granted by one having a Disposition to Lands without Infeftment.*

**S**IR ALEXANDER ANSTRUTHER having purchased the lands of Newgrange from his brother Sir Philip, obtained from him a disposition, containing procuratory of resignation, precept of seisin, &c. Thereafter he sold the same lands to Mr Patrick Haldane, and conveyed to him Sir Philip's disposition, procuratory and precept, Sir Alexander himself never having been infeft. Before this sale to Mr Haldane, Sir Alexander being debtor to the New College of St Andrew's in the sum of 5000 merks, granted the College an heritable bond



bond upon the said lands, upon which instrument of seisin followed, and decret of poinding the ground, even before the minute of sale with Mr Haldane. Several of Sir Alexander's creditors, after the sale, having arrested the price in Mr Haldane's hands, he suspended upon double distress, upon which there arose a competition betwixt the College and the arresters.

It was pled for the College, That their heritable bond with infestment prior to Mr Haldane's minute of sale, is preferable thereto, and must continue a burden upon his right until redemption; in consequence whereof, the College ought to have preference upon the price, in opposition to the arresters; or Mr Haldane must be allowed to retain so much of the price from the arresters as will correspond to the heritable bond, and the College preferred to the mails and duties; which upon the matter is the same with respect to the arresters.

It was answered for the arresters, That Sir Alexander not being himself infest, could not grant an infestment; and therefore the infestment of annualrent was void, so as in no shape to affect the price in Mr Haldane's hand; and the arresters who habily affected the price, fell to be preferred.

In support of the annualrent-right, it was pled, *1mo*, There is a rule in law, That the first disposition entirely denudes that disponer who has no more in him but a personal right; but the heritable bond granted to the College is the first disposition, preferable even to Mr Haldane the purchaser, in respect that Sir Alexander was so far denuded, and *à fortiori* preferable to the arresters. This must obtain, unless a difference be made betwixt a disposition of the property, and an heritable bond or disposition of an annualrent, which indeed is too thin; for a disposition of an annualrent, or heritable bond, is still a conveyance of the right that was in the person of the granter, in so far as the same may be available for the support of the heritable bond: And therefore, if a disposition of the property would totally have denuded Sir Alexander, who had but a personal right; upon the same principles, a disposition of the annualrent did denude, in so far as the annualrent extends; to that effect at least, to make the annualrent effectual against any other, competing upon a second personal right not completed by infestment, such as Mr Haldane's and the arresters rights are. And this is agreeable to another principle, *Qui potest majus, potest et minus*: For is it not absurd that Sir Alexander, who by a disposition of property could totally denude himself, cannot do what is less, *viz.* grant an annualrent? *2do*, Did this infestment of annualrent need any support, and were it otherwise defective, that very defect would *imply* a conveyance of Sir Alexander's own right, in so far as necessary to support it. According to this principle, "Who so wills the *end*, is understood to will all "the necessary *means*." Nor are such *implied* conveyances without example. It is well known, that a disposition of lands will imply a disposition to a reversion; and a liferent-right of lands will imply a right to a tack of these lands subsisting in the granter of the liferent. And the Lords found, "That a liferent of certain lands granted to "a wife, implied a right of reversion which the husband had re-  
"served in the disposition of the same lands granted to his son, so  
"as



“ as the wife might redeem *ad effectum* to enjoy her liferent, 5th December 1665, Beg *contra* Beg.” 3<sup>tio</sup>, Were there nothing else in the right granted to the College, but the assignation to mails and duties contained in the heritable bond, that must found them in a preference; it having been duly intimated to the tenants, by the process of pointing the ground, before Mr Haldane’s right. This is indisputable, since Mr Haldane is not infeft; his disposition, while personal, in effect being no more but an assignation to mails and duties, which can never compete with the assignation granted to the College, having the first intimation. And now that the matter is rendered *litigious*, and brought into judgment, there arises a *mid impediment*, after which it is no longer in the power of Mr Haldane to infeft himself, to the prejudice of the College their right to the mails and duties.

To the *first* it was answered, That the argument is fallacious, as if the constitution of the annualrent were a conveyance of Sir Alexander’s disposition, either total or partial. An heritable bond consists in an obligation to pay, and for security of that payment, an obligation to infeft in lands, with a precept of seisin; which last is of good effect when the party is in a capacity to grant it, but when he has no real right himself, that part of the security stands for nothing; and indeed the College here give it up: All then that remains, is the obligation to pay, and the obligation to infeft, which the College may prosecute against Sir Alexander himself, in such methods as are devised by our forms; but they make not a conveyance, or a divesting Sir Alexander of his disposition totally or partially; an obligation denoting a creditor, not at all an assignee; and therefore can never found any preference against a singular successor of Sir Alexander. To the *second*, It is granted, that whoso wills the end, must be understood to will the necessary means: But does it from thence follow, when one wills what is not in his power, that he must be presumed to will whatever is in his power that may be any way equivalent thereto? If one disposes lands, he is understood to dispose also the reversion; because his end and design being to convey a complete right to the lands, a conveyance of the reversion becomes a necessary mean for that end; and so of the other cases: But if one, having only a disposition and procuratory, go about to constitute an infeftment of annualrent, which is not in his power, he will be liable for damage and interest to the creditor, but the infeftment will be null: And though a conveyance of the disposition and procuratory, redeemable upon payment of the sum in the heritable bond, would be a right pretty much equivalent to the designed infeftment of annualrent, it will not follow, that therefore he has established such a right. Here the brocard would meet him, *Fecit quod non potuit, et quod potuit non fecit*. To the *third*, An assignation to mails and duties, is in itself no absolute right, good against singular successors in the lands: It depends upon the cedent’s right to the property; whenever that fails, the assignation falls of consequence; neither is it any bar to the cedent’s disposing of his property: All which flows from the nature of the right, which is not real in the lands, but barely a personal action against possessors; upon this medium, That they are liable to the proprietor, from whom the assignation is derived. The cedent then,

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notwithstanding the assignation to mails and duties, continues absolute proprietor; so as the assignation can be no *mid impediment* to hinder his alienations, whatever personal action it may produce against him for damage and interest. From all which it follows, the College's right to the mails and duties of the lands of Newgrange, being a conveyance by progress from Sir Philip the proprietor to them, whenever Sir Philip's right ceases by Mr Haldane's infestment, that the College's mails and duties must cease of course, which no *mid impediment* can prevent.

"The Lords preferred the College, assignee to the mails and duties;  
 "at least for the annualrents, ay and while the purchaser's right  
 "be complete by infestment: And reserved to themselves after-  
 "wards to consider whether the assignees preference shall con-  
 "tinue after infestment."

N° LXXXII.

4th February 1726.

Competition Sir EDWARD GIBSON of Keirhill, AGNES ARBUTHNOT, Daughter to Mr George Arbuthnot, Rector of the High School of Edinburgh; and JOHN MAJORIBANKS of Hallyards.

*Clause in a Contract of Marriage, obliging the Father to take the Conquest to himself for the Use and Behoof of the Children in Fee.*

**B**Y contract of marriage entered into *anno* 1685, betwixt Edward Marjoribanks of Hallyards, and Agnes Murray, daughter to Sir Robert Murray of Priestfield, the said Edward Marjoribanks bound and obliged him "to ware and employ the sum of 30,000 merks  
 "upon land or annualrent, at the sight and by the advice of the  
 "persons therein named; and to take the securities thereof to  
 "himself and his said promised spouse, and longest liver of them two  
 "in liferent; and to him for the *use* and *behoof* of the children to be  
 "procreate betwixt them in fee; which failing, to his own nearest  
 "heirs and assignees whatsoever." This sum was to be divided amongst the children, as the said Edward Marjoribanks in his lifetime should appoint; and failing of such division, to be divided amongst them by the proportions therein mentioned. And in a separate clause concerning the conquest, "he binds and obliges him to provide the  
 "just sixth part of all lands, &c. that should be conquest and acqui-  
 "red by him during the lifetime of his said promised spouse, to him-  
 "self and her, the longest liver of them two in liferent; and  
 "the equal half of the said hail conquest to himself for the *use*  
 "and *behoof* of the children to be procreate betwixt them in fee;  
 "which failing, to his own heirs and assignees whatsoever," and to be divided amongst the children, as he in his own lifetime should appoint; and failing of such division, to be divided in the same manner with the above special sum. And by the contract it is provided, that execution pass thereupon against the said Edward Marjoribanks, at the instance of the persons therein named, or any two of them, or their heirs, for implement thereof, in favours of the said Agnes Murray and the children of the marriage. This marriage dissolved by the  
 death



death of Agnes Murray ; and only one child, Jean Marjoribanks, survived the marriage, who was first married to Sir Thomas Gibson of Keirhill, by whom she had issue, Sir Edward Gibson, one of the contending parties, and several other children ; and after Sir Thomas's death, was married to Mr Arbuthnot, by whom she had Agnes Arbuthnot, another of the contending parties ; in whose favours she conveyed the hail provisions and obligations in her father Mr Marjoribanks's contract of marriage, to which she pretended the sole undoubted right, as the only child of that marriage. The said Jean Marjoribanks having deceased before her father, Sir Edward Gibson her eldest son, conceiving that the above obligations and provisions in Mr Marjoribanks's contract of marriage in favours of the children of the marriage, were but destinations of succession, which could not be established in the person of those children, any other way than by service as heirs of provision to Mr Marjoribanks ; and which service his mother Jean Marjoribanks neither did, nor could expedite, having died before her father took out briefs for serving himself heir of provision. In this service compareance was made for Mrs Arbuthnot, and the above disposition in her favours produced, as her title to oppose the expediting thereof. The point of right being reported to the Lords by the assessors,

It was pled for Mrs Arbuthnot, That indeed provisions in contracts of marriage in favours of children to be procreate, are for the most part so conceived, as to import no more but destinations of succession ; but at the same time it is now a settled point, that provisions may be so conceived in contracts of marriage in favours even of children *nascituri*, with regard either to lands or money, as to constitute these children upon their existence proper creditors, and not heirs of provision ; whereby, they have it not only in their power to compel the father to implement the contract, and to denude of the fee in their favours during his lifetime ; but may even compete with other onerous creditors, according to their diligences. The only question therefore to be determined, is, whether by the conception of this contract, and meaning of parties, the children of the marriage were intended to be proper creditors, so as they might have compelled Mr Marjoribanks, even in his lifetime, to vest the fee in their person ; or only heirs, and to have right by way of succession : For if Jean Marjoribanks the only child of the marriage was a proper creditor without necessity of a service, for certain she might convey that right in what manner she thought proper. As to which Mrs Arbuthnot conceives both the meaning and words of the contract are in her favours. The proper interests of the several parties are in this contract carefully distinguished ; the father is bound to take the securities for the 30,000 merks to himself and wife in liferent : As to the fee, he is to take the securities to himself, for the *use* and *beboof* of the children of the marriage in fee ; and the obligation concerning the half of the conquest is conceived the same way. The father's interest in these subjects, whereto he was entitled in his own right, was no more than a naked liferent ; as to the fee, that could not indeed be vested in the children before they had a being, and therefore a method is devised to establish the fee in the person of a trustee, for the *use* and *beboof* of the children ; and the father by this contract is appointed the trustee,

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so that he had the life in his own right ; but as to the fee was but trustee for behoof of his children, and might as any other trustee been compelled, how soon the marriage dissolved, to denude himself of the trust, and to establish the fee in their persons. It is a material circumstance, that execution is provided to pass at the instance of the friends named in the contract, even against Mr Marjoribanks himself, for implement of the contract in favours of the children of the marriage : For had no more been intended but a destination of succession, there could be little use for providing, that execution should pass against him in his lifetime.

Answered for Sir Edward Gibson, It has been frequently determined, that an obligation in a contract of marriage upon the husband, to take a subject to himself and wife in life, and to the children of the marriage in fee, does not constitute the children creditors, but only heirs of provision : If then an explicit obligation to take the fee directly to the children make them not creditors, far less an obligation to take the fee to himself for their *use* and *behoof*. It is very hard to conceive a reason, why the paction should be interpreted less strong, where the fee is directly stipulated to the children, than when covenanted to be in the father for their use and behoof : In the one case, there might seem some reason for pleading that the fee must be directly put in their person, so soon as they are capable of it ; but in the other, none at all, parties having chosen this method of letting the fee rest with the father till his death, but limited in his person for their *use* and *behoof*. And the case here is the more plain, that the father had a power of distribution at any time during his life ; and even at the last moment before his death, he might have made what division in the fee he pleased amongst his children. Is not this inconsistent with their character of creditors ? for how could an action be competent during the father's life ? If there was an action, each of them could pursue ; but what could any of them pursue for ? It is obvious, till their father's death not one of them could ask a sixpence ; which is a demonstration they could have no action, and consequently were not creditors. A power of division therefore to be exercised at a father's last moments, plainly imports, that the *use* to the children is only to commence at the father's death, and that they are heirs, not creditors. To strengthen this let it be considered, the principal question here is not concerning any determinate obligation, of a specific sum, or particular lands, which might more easily imply a *jus crediti* ; but concerning an undetermined obligation to provide an *universitas*, *sciz.* the conquest, to the children of the marriage ; which has always been interpreted to resolve into a succession : Nor in any case has the contrary been determined ; and there is the more reason here, that besides the power of division in the father, no particular time is limited for him to denude : And therefore these obligations, were they even explained as proper debts, with relation to the particular sum of 30,000 merks, as to the conquest could import no more but a destination of succession. The last evidence shall be mentioned, that these obligations concerning the conquest, import no more but a destination of succession, is this, whatever debts were contracted by Mr Marjoribanks any time of his life, must certainly affect the conquest, the  
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childrens provisions notwithstanding, which is plainly inconsistent with these provisions being strict obligations.

Replied for Mrs Arbuthnot, The clauses with relation to the conquest are concerted in the same form and style with that of the special sum: Now, whatever meaning the parties had with relation to the special sum, how is it possible to put a different meaning upon the same words in the clause of conquest? Were there therefore any foundation for the distinction of an obligation to provide an *universitas*, and to provide a definite sum, it could have no place here. But *2do*, There is no foundation for the distinction: Without question one may convey or dispoise even a *spes successionis*, what he may succeed to by the death of another; and upon devolving of the succession, the disposee has an action against the dispoiser to make up proper titles, and denude. In the same way may one assign, or oblige himself to assign, the profits to be made in any particular adventure, or during a particular time. The obligation in question is of the same nature: Mr Marjoribanks became bound, "whatever lands, &c. he should acquire during his wife's lifetime, to take the rights and securities of the half to himself, for the use and behoof of the children of the marriage in fee." Would not a contract of this kind, entered into with any third party, been effectual? Or let it be supposed Mr Marjoribanks had been obliged to take these rights in name of some third party, for the *use* and *behoof* of his children, as aforesaid; would these children have succeeded as heirs of provision to their father? Certainly they would not. And if that is admitted, then there is no difference, as to this point, betwixt an obligation for a special subject, and an obligation of conquest within a time limited. Nor can it make any difference in the dispute, whether the father or a third person had been trustee for the children; otherwise this contract would be a destination of succession even as to the special sum; the contrary whereof must however be admitted. In the *next* place, It is wrong to advance, "That the subject could not be ascertained, nor the father obliged to denude during his life;" for even heirs of provision have a title to ascertain the extent of the conquest upon the dissolution of the marriage; which undoubtedly Jean Marjoribanks might have done; after which she had another obligation upon her father, to take the investments of the half of the conquest to himself for her use and behoof *nominatim* in fee, or in her option to have denuded himself of the fee of that half; because a trust implies in the nature of it, an obligation to denude. And the one or other would equally have served her purpose: For though he had continued in the trust-right, after taking investment to himself for her use, she would have been as much fiar, as he had been denuded in her favours; and might have disposed of the subject as she thought proper, even during his life; as any person possessed of a backbond of trust might do. As to the other argument, "That no time is limited for his denuding," it can signify nothing in this question; because had the father taken the securities of the half of the conquest to himself in trust, for the use and behoof of his daughter *nominatim* in fee, it would have had the same effect, as he had totally denuded in her favours; and that he was obliged to have done, so soon as it could appear what was the extent of the conquest, and how many children were of the marriage;



age ; that is, he ought to have done it immediately after the dissolution of the marriage. Add to which, *quod sine die debetur statim debetur*, and a trustee may at any time be obliged to denude, though no special time be limited. The power of division is also laid hold on, to help out this argument, that the father was designed to be proper fiar, and not trustee ; but it seems evidently to point the other way : Indeed a power of division is a native consequence of one's having the property ; but the reserving such a faculty directly implies that the father had no right of fee, no power to divide without that reservation. Where the father is fiar, and the children only heirs of provision, he cannot only do onerous deeds, but likewise rational deeds, in favours of a second marriage, or so ; and consequently much more has he a power of making a division amongst his own heirs of provision of the same marriage, without any reserved faculty, as has been frequently found ; the natural import therefore of a clause reserving such a faculty, is, that without the reservation he has no such power ; and consequently that he is not fiar : For though a power of division may subsist without the property, there can be no property without a power of division. Answered to the last argument about the debts ; that if by Mr Marjoribanks's debts here, are meant debts contracted before dissolution of the marriage, there is no question these would affect the conquest even preferable to the children ; because albeit these children upon their existence, became creditors to their father, they were only creditors *sub conditione*, providing there should be any conquest during the marriage, which conquest could only be computed, *deductis debitis*. And 2dly, As to debts contracted after the dissolution of the marriage, so long as the trust-right remained *in nudis finibus obligationis*, while the father was by the rights and investitures of his lands, absolute proprietor, there is no doubt that creditors contracting with him, or purchasing from him, would be preferred, at least according to their rights and diligences ; but even in that case, it must be admitted, that the children would have a proper action against their father, or his heirs of line, to relieve the conquest of these subsequent contractions, though for onerous causes ; which is a certain evidence that this is no destination of succession.

“ The Lords found, That Edward Marjoribanks of Hallyards, by  
 “ the contract of marriage, obliged himself to provide the equal  
 “ half of the conquest to himself, for the use and behoof of the  
 “ children of the marriage in fee, whereby he became a trustee  
 “ for the behoof of the children of the marriage ; and that ac-  
 “ tion was competent to the only child of the first marriage, af-  
 “ ter the decease of the mother against her father in his own  
 “ lifetime ; and that the same action is now competent to her  
 “ daughter, as her assignee, against the heirs of her father ; and  
 “ therefore found there is no place for Sir Edward Gibson's ser-  
 “ vice, as heir of provision to his grandfather.”

And again, after a reclaiming petition and answers, they found the right of the clause of conquest, in Edward Marjoribanks's contract of marriage with Agnes Murray, passes by assignation, and not by a service ; and therefore preferred the assignee ; and found there was no place for Sir Edward Gibson's service to his grandfather Mr Marjoribanks.



N° LXXXIII.

4th February 1726.

*A Tocher given by a Father in his Daughter's Contract of Marriage, imports not a Discharge of the Conquest provided to her in her Father's Contract of Marriage.*

**I**N this same process it was pled by John Marjoribanks of Hallyards, heir of the said Edward Marjoribanks his second marriage, against both the above parties, Sir Edward Gibson and Agnes Arbuthnot, That their mother Jean Marjoribanks, only child of Edward Marjoribank's first marriage, being provided to the sum of 25,000 merks, in her contract of marriage with Sir Thomas Gibson, whereof 15,000 merks payable soon after the marriage, and the remainder at his death, it must be understood in *satisfaction* of all she could demand in name of conquest or otherwise, although not expressly bearing to be in *satisfaction*; from this principle, That provisions in contracts of marriage are always understood to be in *satisfaction*; *Stair, l. 1. t. 8. § 2. in med.* which was pled with the more assurance in this case, in respect it was a most equal transaction, and the 25,000 merks an ample equivalent for what her claim was worth at the time of her marriage with Sir Thomas. For the provision of 30,000 merks being restricted in the case of one daughter to 16,000, and that not payable till after the father's death; it cannot be denied but the 25,000 merks, whereof 15,000 presently payable, was a full equivalent for the 16,000, payable after the father's decease, and for the present worth of her share of the conquest; which might have been nothing at all; which she might not have lived to have right to, and which might have proved very inconsiderable, if more children of the marriage had existed, her father and mother's marriage subsisting at her marriage with Sir Thomas Gibson. And though this point should not be pled so high, as to presume provisions in contracts of marriage to be always in full *satisfaction*; let them be in *satisfaction pro tanto*, and imputable in former provisions, which must be allowed and determined 29th June 1680, Young *contra* Pape and Vans. This will be sufficient for John Marjoribanks; because it follows, That where the last provision is higher than the first, it must be reckoned in *satisfaction* of the first; which squares precisely with the present case, in that, according to any rational way of computing, the provision here given in the contract of marriage was more valuable at that day, than any claim or *spes successionis* the daughter had.

Answered for Sir Edward Gibson and Agnes Arbuthnot, It is a general rule, that a creditor is not presumed to discharge his right; and in the present case, where a father is giving to a daughter, the presumption is rather whatever provisions he stipulates in the daughter's contract, beyond what he was expressly bound to, are done *animo donandi*. It is granted indeed that provisions in a contract of marriage, will, so far as they go, extinguish every former *special* provision; but by no means any *undetermined general* claim, as a clause of conquest, a legitim, or such like; which is perfectly agreeable to the decision Young, cited above: Thus the 25,000 merks will extinguish the former 16,000 merks specially provided to the daughter, because  
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he who gives 25,000, at the same time gives 16,000; but the excrement sum of 9000 merks will not be imputed in satisfaction of her claim of conquest *pro tanto*; which was not so liquid as to admit of any thing like compensation, or imputation; nay, properly speaking, was not in being at the time, but did afterwards supervene at the dissolution of the father's marriage by the mother's decease; and therefore that superplus will be understood as a donation flowing from paternal affection, not as payment or anticipation of a claim that had no proper existence till afterwards, and for that reason not presumed to have been under consideration. The same way, a bond of provision, or a tocher contracted, though never so great in extent, if it bear not in satisfaction, will not exclude the acceptor from his legitim. It is true, to make an equality amongst children, *collation* or *imputation* is introduced; and so, if there had been more children of Mr Marjoribanks's first marriage, the half of the conquest would have been set apart to them from the heir; and in drawing her share thereof, Mrs Jean behoved to collate the sum already received; but the benefit of that would not in the least accrue to the heir, but to the other children. And therefore Mrs Jean being the only child of the marriage, she must have the provision of conquest entire, beside the general provision in her contract of marriage. It has no influence upon the argument, though it should be found, that the provision of conquest falls not to the children as heirs (which is Sir Edward Gibson's plea) but as creditors; for still the right is but conditional during the marriage, and not presumed to fall under the consideration of parties, more than a succession in the proper sense; because it was only at the dissolution of the marriage, their right became absolute, purified then by their surviving; and in this it goes hand in hand with a legitim, which becomes an absolute right no sooner than the father's death; nor is it a succession in a proper sense, because the child does transmit it without confirmation.

“ The Lords found, That the tocher given to Jean Marjoribanks,  
 “ by Edward Marjoribanks her father, albeit more than the sums  
 “ specially provided to her by her mother's contract of marriage,  
 “ does not import her acceptance thereof, in full satisfaction of  
 “ the clause of conquest so provided by the said contract.”

The same was found with respect to the legitim, betwixt the Ladies Balmain and Glenfarquhar, where the Lords found, 11th December 1719, though the daughter was forisfiliate by marriage, and had got a considerable tocher, not mentioned indeed in satisfaction, “ That she had right to a full third of the defunct's moveables, without any deduction or regard to the portion formerly received by her from her father.” Here it was mainly pled for the relief, that the legitim is a right of property in the communion of moveables, which the children must lose by forisfiliation, since thereby they abstract themselves from the society or partnership.



N° LXXXIV.

21<sup>st</sup> June 1726.

Sir WILLIAM JOHNSTON of Westerhall *contra* the Marquis of ANNANDALE.

*The Actions negotiorum gestorum, in rem versum and funeraria are not competent, where the Pursuer acted upon another's Mandate, without Intention to serve the Defender.*

**S**IR WILLIAM JOHNSTON, upon an order from the Marchioness of Annandale, to raise money for defraying the late Marquis's funerals, by which order she obliged herself to indemnify him for the same, having uplifted the sum of L. 482 of bygone rents from Henderson, one of the late Marquis's factors; this Marquis brought an action against him, to account for this and other intromissions; and Sir William brought a counter-action against the Marquis, for cognoscing the charges of the funerals, and for declaring, that the money uplifted from Henderson being laid out that way, ought to be sustained as a sufficient article of discharge and exoneration.

It was pled for the Marquis, That Sir William having followed the faith of the Marchioness in raising the money by her order; the presumption is, that he acted solely in consequence of that order, with a view to serve the Marchioness alone; and there is no presumption, that he had an intention to oblige the heir; whence, as he could have no *actio negotiorum gestorum, in rem versum* or *funeraria*, against the heir, in his own right, but in name of the Marchioness his employer; so now when he is pleading a discharge and exoneration against the heir, he cannot separate himself from the Marchioness; for that discharge being founded upon the application of the rents to the funerals, which, in the eye of the law, is the Marchioness's deed, according to this maxim: "*Qui facit per alium, ipse facere videtur.*" If he plead upon her deed, he must sustain all the legal objections competent against her; and were she in the field, it would be competent for the Marquis to plead against her, that *intus habuit*, by her intromission with her deceased husband's executry in England; and that therefore she could not plead upon the application of the rents intromitted with in Scotland, to the defraying of the funerals, which she had no title to uplift.

It was answered for Sir William, That the *actio negotiorum gestorum, in rem versum* or *funeraria*, arises from the *fact* of applying money for another's behoof, whether the *intention* was to serve that other or not; thus Sir William having uplifted the defunct's rents, and applied them to his burial, it was *utiliter gestum*, and he must be exonerated at the hands of all concerned; and it matters not whether he acted by a mandate or not; for what prejudice is it to the Marquis, that Sir William took a further pactional security from the Marchioness for his own safety? So then, if any man lay out money profitably, for the behoof of another, suppose he take a third party bound to indemnify him, that is but an additional security; and the person that lays out the money, has it plainly in his choice, to pursue him for whose behoof the money is laid out, or to take himself to the additional se-

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curity given by the third party, who becomes engaged to keep him skaitheless. And when the action is directed against the person benefited, it is plainly in the pursuer's own right, as being founded upon his fact of application, and therefore he cannot be obliged to sustain any objection that might be competent against his mandant.

Replied, When a master gives orders to his servant to do any fact, the actions arising therefrom, are competent to the master alone: Thus Sir William Johnston is only to be considered as the Marchioness's hand; as he laid out the money by her order, he has no action or exception, but as in her right. For in general, it signifies not who acts, but in whose name, and by whose authority.

"The Lords found Sir William could be in no better case than the Lady Marchioness."

N<sup>o</sup> LXXXV.

June 1726.

KATHARINE HARVIE *contra* Mr GEORGE GORDON, Professor in Aberdeen.

*A Deed intrinsically null, if capable of Homologation?*

**K**ATHARINE HARVIE, the youngest of five heirs-portioners, having jointly with her sisters disposed the common heritage to Mr George Gordon, took bond for the price. At that time she was only eleven years of age, and consequently the deed as to her *ipso jure* null: In a reduction therefore of that disposition at her instance, it being alleged, that after her majority, she had homologated the transaction, by accepting the annualrents of her share of the bond given for the purchase. The question arose, "If a disposition of lands *ipso jure* null, is of that nature, to receive any force from homologation."

And it was pled for the pursuer, in such things as may be perfected *solo consensu*, and where writ is not necessary, it is allowed that null deeds may be homologated, because the deeds of homologation are a proof of an after-consent: And so if a pupil had granted a bond or sold his moveables, deeds of homologation after majority might validate the deed or sale, because in neither of these cases is writ necessary; so the wife's new promise after dissolution of the marriage, is an effectual new obligation, and effectual, though the former was *ipso jure* null. But the singularity of the present case lies here, that by our law there can be no conveyance of heritage, without some valid deed in writing, however express the consent of parties be; now the disposition in question is *ipso jure* null, not any conveyance of the property, more than it had been a disposition without the subscription of the party or witnesses: Wherefore it is necessary, that there intervene some valid writ, obliging her to dispose the lands; for her verbal promise to dispose, or her facts and deeds implying an acquiescence in that null writ, does no more oblige her to sell or quit her property, than if no such null writ had intervened.

It was answered, That here the disposition is in itself a formal valid deed, without any objection that appears against it *ex facie scripturæ*.



*ture*. It is indeed reckoned null, as subscribed by a pupil; but what is understood by this nullity? Not that it is entirely and to all intents null, as a disposition unsubscribed; this cannot be the meaning, for without question it is a good title for prescription; but barely that the objection of its being the deed of a pupil is receivable against it, directly by way of *exception*, without necessity of a *reduction*: The disposition then is *in itself* a formal deed, and proper to convey the lands in question: The pursuer indeed had an objection against it, sufficient to hinder the transmission; but if she has consented expressly or tacitly not to use this objection, the case comes to the same, as if it never had been competent; for though land-rights are not transferable by sole consent, any objection may be renounced by sole consent, competent against a disposition of lands already formally constituted. To illustrate this, let it be considered, that a disposition of lands by a minor in the confines of majority, without consent of curators, is equally null with a disposition granted by a pupil; and yet it will hardly be maintained, but that the disposer's express ratification after majority, though not in writ, will exclude him from making any objection against the conveyance.

Replied, If it should be yielded, that a verbal ratification is sufficient to confirm a minor's disposition, there is no argument from that to the case in dispute. It might be pled with some shew of reason, that a minor's deeds without consent of curators being null, not for want of a formal consent, but from the presumption *juris et de jure* of lesion, if in his majority he renounce the objection, the deed comes to be good; for here the deed is once formally established, with all its essentials, and the objection competent against it, not founded in any *intrinsic* defect of the right, but in the *personal* circumstances of the granter: And this will be more evident, when deeds are considered, granted by minors who have no curators, which are equally effectual, as where there are curators, and they consenting. Now it appears plain, all other things being equal, that the *extrinsic* circumstances of a minor's having or wanting curators, cannot have the force, to make *intrinsically* null or formal, any deed granted by him: And therefore it is, when a minor's deed without consent of curators, is pronounced *ipso jure* null, it is not that the deed is any way *intrinsically* defective, more than where the curators consent, or where there are no curators; but simply in opposition to these cases, where lesion is not presumed, but must be proven, which makes the form of a reduction necessary; whereas here the lesion being apparent without any proof, as a defence instantly verified, needs not run the circuit of a reduction. But when deeds granted by pupils are said to be *ipso jure* null, it is in a different sense; there the nullity is *intrinsic*, through the original want of consent, the law having laid down in general, a *præsumptio juris et de jure*, in the case of pupils, idiots, madmen, that by defect of understanding, none of them are capable to consent, or bring themselves under legal engagements. The comparison therefore is just, at least as to the question in hand, that this disposition is no more effectual, than if remaining unsubscribed; the simple consent of the granter is no more capable to validate the one than the other; and whatever effect homologation may have, to remove an *extrinsic* objection competent against a written



written conveyance of lands, it certainly never can have the effect to establish such a conveyance, where there truly is none.

It was argued in the *next* place for the defender, Granting this deed *ipso jure* null, as wanting that rational consent to which alone the law gives effect, and which only can be adhibited by one *sciens et prudens*; yet when that consent is afterwards adhibited, and the deed no longer wants any of its essentials, *eo ipso* it becomes completed and effectual, as that rational consent had been interposed in the beginning.

To which it was answered, Since the alleged effect of the consent here, is not to take away any *extrinsic* exception, that might be competent against a conveyance in itself *intrinsically* good; but truly to establish and validate a conveyance, without that consent intrinsically null and of no avail, it ought to be in writing, according to all our laws and practice: For in general, "no consent can have the force of a conveyance of lands, whether originally interposed, or referring to an anterior otherwise intrinsically null deed, unless it be in writ."

The *second* point pled was, How far there was sufficient evidence of homologation, supposing the deed capable thereof. And it was condescended on, That she received some of the annualrents and a part of the principal sum in minority, and some of the annualrents after majority, of the bond which was given by the defender for the price of the lands, which was contended to be as strong an act of homologation as could be; for taking the annualrents was an acquiescence in the bond, and consequently in the disposition: And here there are a series of facts, which shew the acquiescence to have been most deliberate.

It was answered, The pursuer's knowledge of the bond, does not infer her knowledge of the disposition, to which the bond refers not; there is therefore no evidence, that she knew the circumstances of the transaction; without which knowledge, homologation or acquiescence can never be inferred. And there is this further circumstance, that though she was truly major, she signed the discharges of the annualrents together with her curators, as if minor; whence there is a presumption, she thought herself still minor; and in these circumstances she will be considered, rather as relying upon her curators, than acting *ex propria scientia*. 2do, The facts condescended on were not so *free* and *voluntary*, as to infer any sort of consent or acquiescence: Mr Gordon was possessed of the pursuer's estate; she had no other fund whereupon to subsist; it was therefore of absolute necessity that she accepted the annualrents; and the law would attribute her acceptance to that cause, and not infer homologation, even though she had known the whole transaction: And indeed it would be inhumanity to interpret an act of such necessity, a forfeiture of the pursuer's right, especially when her adversary was possessed of her estate, and on that account was debtor in much more than he paid her in name of annualrent.

Replied to the *first*, One truly major, is presumed to be *prudens* and *sciens*, and is not presumed to take payment of a bond, without knowing for what cause it was granted; besides that by a clause in the bond, it became only payable, upon homologating and approving the disposition in question, which being express, leaves no room for presumptions.



sumptions. To the *second*, If the pursuer chose rather to ratify a reasonable transaction made with Mr Gordon, than to lay out money upon a reduction thereof, and in the mean time want her annual-rents, this will be interpreted the effect of prudence, rather than of necessity: And even the necessity alleged, is but a necessity of choice, a reasonable motive, to oblige one to consent to one thing rather than another; by no means such a necessity of nature, as to take away the freedom of the mind, and capacity of giving consent.

“ The Lords found, That the deeds and qualifications of homologation insisted on, do not oblige the petitioner to ratify or renew the disposition quarrelled.”

N<sup>o</sup> LXXXVI.

June 1726.

Mr JOHN CAMPBELL, Minister at Kirkbean, *contra* Dr JOHN MURRAY of Cavens.

*If an Heritor, upon whose Lands the Stipend is localled, is liable personally to the Minister?*

**I**N the year 1650, a decret of modification and locality was obtained at the instance of the minister at Kirkbean, against the heritors; and the proportion of stipend, which by that decret was charged on the teinds of the twenty-four merk-lands of Preston, which are now the property of Dr John Murray, extends to 440 merks; these lands of Preston being parcelled out in small tenandries, the tenants were in use to pay the allocate stipend; but the arrears in two or three years having run up to the sum of 1020 merks, Mr Campbell the present incumbent charged Dr Murray the heritor upon the decret of locality for the same. The heritor suspended, upon this reason, That he was neither titular nor tacksmen of the teinds, nor intromitter with a joint duty for stock and teind, and therefore not personally liable.

It was urged for the pursuer, That in the present case, where there is no titular in the possession of the teinds, where there is no mortal that receives or intromits with the teind but the heritor, or these deriving right from him, the heritor must certainly be liable, whether he himself actually intromit, or his tenants deriving right from him: The lands which are here burdened with this stipend, are truly possessed by the heritor, though he sets out the same to his tenants, for tenants are not properly accounted possessors; therefore as *possessor* the heritor becomes liable for the minister's stipend. And certainly it can make no alteration, whether one cultivate land himself or by others; the product does truly belong to him, whether he receives the same immediately out of the ground, or has it handed to him by tenants, to whom he commits the culture thereof; when he receives the rent, he gets the product of the ground, for the rent is but the product converted into money: And as the teinds are a debt upon the fruits, chargeable on the intromitter, the suspender is liable as intromitter, though he has not actually touched the specific product, since he has accepted of a rent in lieu thereof.

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It was answered, That where the heritor sets his land for a joint duty for stock and teind, where he sets the teind expressly as well as the stock, there the pursuer's argument is conclusive, because in a word, *Qui facit per alium, facit per se*; but it fails, in that here the tenants have not tacks of the teind from the heritor; he sets to them nothing but his own *interest* in the ground, and the rent he draws is expressly in lieu of that interest, not at all for the teind; so that he has this relevant defence, "That he never intromitted with any parcel of the teind, nor any thing in lieu thereof." It is indeed true, that by the master's tack of the stock, the tenants have access to the teind; but that has no influence; whoever draw the teind, whether titular or tacksmen, the master has no concern; if the tacksmen, he must be liable no doubt, according to his intromission, but not at all his master, since none can be liable for the facts of others whom they did not authorise: The master gave authority to his tenants to labour and sow the ground, and to separate the fruits therefrom; but by none of these are the tenants made liable for the teind, but by their *fact* of appropriating the teind by *perception*, which they had no authority to do from their tacks, and which they had in their power to shun, by intimating to the titular, or others having right, to come and make a separation betwixt stock and teind; and in defect of them, to make the separation themselves, at the sight of a competent judge.

It was pled, in the *second* place, for the pursuer, Whatever is in the general case, here where his right is founded upon a decret of modification and locality, the heritor must certainly be liable. A stipend being *debitum decimarum*, affecting all the teinds; whenever it is localled upon any particular teinds, it ceases to be a burden upon the rest; which would be unreasonable, as taking from the minister's security, if in lieu thereof, by the decret of locality, there were not a personal action against the heritor. Whence it is, that when a decret of modification and locality is made out to the minister, and that a proportion of stipend is laid upon the teinds of any particular heritor's lands, it is always the meaning of such determination, that the minister have access for his payment against that heritor for one entire sum; which therefore cannot split and be divided amongst his tenants without the minister's consent.

To which it was answered, That this would not even be a plausible argument, though the pursuer could say, that a decret of locality is designed in favours of the minister; whereas, on the contrary, the power of localling stipends is given to the patron, without any view thereby of making the minister's condition better. For the minister's security is not weakened, in respect notwithstanding a decret of locality, the remanent teinds continue to be liable, though only, in the *second* place, failing the localled bolls. But more directly, by what power can it be pretended, that the proprietor of a piece of land must be liable for stipend personally, because it pleases the patron to burden the teind of that piece of land with more or less of the stipend, which teind perhaps belongs to quite another person? There is not the smallest connection to produce such an effect: The stipend indeed may be localled upon any portion of the teind; for stipends being a burden upon the whole teind, this is no more but restricting a right to a part, which was before over the whole; but that in consequence of



of this restriction, any third party who has no right to teind, should become personally liable, without his consent, and contrary to the nature of his right, is so repugnant to the common principles of equity and justice, that the pursuer must surely bring more than a plausible argument, drawn from conveniency, before he gain his point. And this looks still more odd, when it is considered, that no mortal is directly liable for stipend, which affects only the teind, and not the teind-master, except in so far as he intromits therewith; and yet the intent of this process is, to make one liable for stipend, who is neither teind-master nor intromitter.

It was further urged, That unless the heritor were personally liable, where the stipend is localled, it would be easy for him, in the management of his lands, to defeat the minister's right: For, if he turn them all into grass, by this argument he shall be quite excoemed, and liable for no localled bolls.

Answered, Where bolls are localled, whether the lands produce that species or not, it is thought the minister will have an action against the possessor *pro interesse*; for as he would be liable for no more than the localled bolls, however great his quantity of teind happen to be, he ought to be liable for no less, however small be the quantity. But were this otherwise, the argument would yet be inconclusive; for when the stipendiary cannot make his locality effectual, the remanent free teinds of the parish are liable *subsidiariè*; which is evident, in that the stipend being *debitum decimarum*, the decret of locality does not excoem the other teinds, but decerns only the stipendiary to draw the localled teinds first.

“ The Lords found the heritor not liable; but this sentence being  
“ reclaimed against, the cause was afterwards taken away by a  
“ submission.”

N° LXXXVII.

5th July 1726.

Competition betwixt SINCLAIR of Southdun, and SINCLAIR in Brabsterdoran.

*Competition betwixt an Executor-creditor, and an Assignee by the Defunct.*

**S**INCLAIR of Southdun, executor-creditor to the deceased James Sinclair, clerk to the bills, confirmed a debt due by James Murray merchant in Leith, and upon this title competed with Sinclair in Brabsterdoran, to whom James Murray's debt had been conveyed by the creditor James Sinclair, but never intimated.

For the executor-creditor it was pled, That an assignation without intimation, is like a disposition without infeftment; they import equally a personal action against the author, but are by no means a conveyance; the author is not denuded until intimation or infeftment; in demonstration whereof, the author can again assign or dispo-  
pone the subjects; and the first intimation or infeftment will be preferred, which could not be, were the author denuded by the simple assignation or disposition; for upon that scheme, the second would be *à non habente potestatem*, and consequently null. The subject therefore  
remains



remains with the cedent, until intimation by the assignee, conveyable again by his voluntary alienation, and affectable by his creditors.

On the other side, it was pled for the assignee, That nothing can be understood as *in bonis defuncti*, but what belonged to him before his death, what in a strict sense he could call his own, and as such, dispose upon at his pleasure. Now, for this reason, a sum assigned, though there is no intimation, is not *in bonis defuncti*, the defunct did all in his power by the assignation to alienate; and if the intimation was further necessary, that was the work only of the assignee. In a word, it is inconsistent that a subject be considered as mine, which I have done the utmost to alienate, and which I cannot therefore dispose of, or intromit with, without being guilty of a crime. That intimation is a ground of preference amongst assignees, makes no argument, for that is *in favorem* only of the diligent, contrary to the nature of the conveyances; and were the nature of the rights only considered, the first assignation would undoubtedly be preferred. And this seems to be the plain import of the act of Parliament made in 1690, which declares, "That special assignations, though not intimate in the life of the cedent, are good and valid rights and titles; albeit the sums of money therein contained be not confirmed." For if, notwithstanding such special assignation, the sums of money or goods specially assigned were *in bonis defuncti*, a confirmation by the analogy of our law would be necessary. In the last place, the decision 27th July 1669, Redpath *contra* Home, was adduced, mentioned by Lord Stair, l. 3. t. 1. § 15. where this case was determined.

It was answered, That the preference given to the first intimation, is from the nature of the thing; the favour of diligence it cannot be, if it be allowed, that his case is less favourable in the way of diligence, who intimated yesterday an assignation he obtained a twelve-month ago, than his who got but his assignation this day, and intimated the same moment, and yet the first intimation in all cases is preferred; it can only be, therefore, that the cedent is not denuded until intimation; notwithstanding the assignation, the subject remains in his person, which he can validly uplift or assign, as no assignation had been granted; if, indeed, he use this right in prejudice of the assignee, he will be liable upon the personal warrandice in the assignation, which is all the assignee can in law affirm; but he ought to reflect, these two are very compatible, a *right of property* in one's person, and an obligation upon him to transfer that property to another, which he cannot disappoint, without being liable *pro interesse*. Answered to the argument drawn from the act 1690, Though the subject truly continues *in bonis defuncti*, notwithstanding an assignation unintimated, it will not follow, that the assignee must be confirmed, the intimation without more, taking the subject out *ex hereditate jacente mobilium*, and establishing it fully in the assignee: And in this, an assignation is similar to a disposition or adjudication, upon which infestment taken after the death of the disposer or debtor establishes the subject, which in the interim was *in hereditate jacente*, completely in the person of the disponent or adjudger. As for the decision cited, the circumstances are not the same; there the assignee had got a bond of corroboration, and a partial payment after the cedent's death, which has been always reckoned equal to an intimation. To conclude,



clude, the subject in dispute remained *in bonis defuncti*, notwithstanding the unintimated assignation. The confirmation was the first completed conveyance, taking the subject out *è medio*; and upon that title, the executor-creditor falls to be preferred.

“ The Lords preferred the executor-creditor.”

N<sup>o</sup> LXXXVIII.

22d July 1726.

Competition JEAN EDMONSTON with ELISABETH THOMSON.

*Abbreviate of Adjudications must be recorded.*

**J**EAN EDMONSTON, having right to an adjudication of certain lands, craved to be ranked *pari passu* with the first effectual adjudication, in the person of Elisabeth Thomson, being within year and day thereof.

It was objected, That the abbreviate of Jean Edmonston's adjudication is not recorded; and Elisabeth Thomson's adjudication, duly recorded, is preferable by act 31. Parl. 1661.

Answered, The act 62. Parl. 1661, brings in *pari passu* all apprisings within year and day of the first effectual apprising, without any mention of allowances; therefore, the act 31. concerning allowances, cannot relate to such as are within year and day of the first effectual apprising; for, at that rate, the apprising first allowed should be preferred, even to those within year and day, contrary to the provision in the 62d act. So that, to take these acts in consistency, the last relates to adjudications within year and day, the first to all others.

Replied, The act bringing in apprisers *pari passu*, does not indeed specify, that the apprisings must be recorded; neither does it specify any other formality: But, certainly, when apprisers within year and day, are brought in *pari passu*, the act can be understood of such only, as have all the solemnities and formalities required by law: And in this way, the acts are perfectly consistent. That this was the meaning of the Legislature, will appear, because otherwise the record of abbreviates would be of no use; for if apprisings need not be recorded, to give them the benefit of the act 62. an apprising led thirty or forty years before the first effectual one, must come in *pari passu* with it: A purchaser then can have no security, by looking to the record of abbreviates; he must turn over the whole records of the Court of Session for forty or fifty years, together with the register of interruptions; for otherwise he can know nothing of many adjudications, which will come in *pari passu* with the first effectual one, though he sees nothing about them in the record of abbreviates. To what purpose then would that record signify?

“ The Lords found, That the adjudication, whereof the abbreviate  
“ is not duly recorded, in terms of the act 31. Parl. 1661,  
“ though led within year and day of the other adjudication,  
“ whereof the abbreviate is duly recorded, cannot be brought in  
“ *pari passu* with it.”

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N<sup>o</sup> LXXXIX.



N<sup>o</sup> LXXXIX.

27th December 1726.

JEAN CANT, Relict of Borthwick of Hartside, *contra* BORTHWICK of Crookston.

*The Act 1685 regulates not the Constitution of Tailzies made prior thereto.*

**B**ETWIXT these parties the question occurred, If tailzies made before the act 1685, anent tailzies, fall to be regulated thereby, so as to be ineffectual against creditors, if not registered, &c.

And for Jean Cant, it was pled, That the law makes no distinction, but lays down a plain and general rule, to *disallow* of all tailzies where the directions of the statute have not been observed, without any limitation or exception; and therefore Lord Stair, *tit. Infeftments of Property*, § 58. near the beginning, speaking of the statute 1685, adds, "That this statute did weaken the former tailzies with clauses irritant;" which it could not, did they not fall under the statute. And if better authority could be necessary, we have that of the Legislature in the act 33. 1690. There it is laid down for a rule, and a just one it is, "That such rights as are not in a man's power to alienate by consent, should not be confiscate by his crime:" And in consequence of this rule it is statute, that the possessor of an entailed estate should not forfeit in prejudice of the heirs of entail; but with this express proviso, "That the right of tailzie be registrate conform to the act of Parliament in the year 1685;" which plainly shews the sense of the Legislature, that even a tailzie made before the act 1685 ought to be registered, otherwise to have no effect against forfeiture, and of consequence far less against creditors. And thus also it was determined, 28th July 1725, Viscount of Garnock *contra* the Master, &c.

To which it was answered, This law has no retrospect; it gives directions concerning tailzies *to be made*, leaving those that were made to stand upon the principles of law then received: And where it says, "That such tailzies shall only be allowed," &c. it cannot possibly understand any tailzies, but "such as were to be made;" and had it been otherwise, the Legislature would certainly have found proper words to have expressed it plainly, and not left it to a construction or implication, since it was a case that could not escape notice. As to the authority from the act 33. Parl. 1690, it is true, the proviso of the act 1685 is there only mentioned, with no view to exclude former tailzies that were not in terms of the proviso, but *ex eo quod plerumque fit*; because the generality of settlements of that kind, were posterior to the act. As to the decision the Viscount of Garnock; the Lords did not find, that the act 1685 regulates the CONSTITUTION of tailzies made before the act, but only the TRANSMISSION; and for good reason, for though the act has no retrospect to invalidate tailzies habilely constitute *ab ante*, it may well regulate the *transmissions* of tailzies; which transmissions are posterior to the act. To conclude, This act of Parliament has no retrospect; registration belongs



longs to the constitution of tailzies; and if it was not necessary to tailzies before the act, the act has not made it necessary.

“ The Lords sustained the tailzie, though not recorded conform to the act of Parliament 1685, in respect the same was granted before the act.”

N° XC.

27th December 1726.

*Heirs of Tailzie, how far at Liberty to provide Wives.*

**T**HERE was another point debated betwixt these parties, If an heir of an entailed estate with strict prohibitory and irritant clauses, can give a liferent-provision in favours of a wife; or if the same is excluded by the generality of the prohibitive clause *de non alienando*?

And it was argued for Jean Cant the relict, who had got a bond of annuity from her deceased husband, That if not mentioned in the most express terms, it will never be understood any tailzier designed to restrict his heirs from making suitable provisions to their wives and children, which is necessary for the continuance of the tailzie, because otherwise it would be a tacit exclusion of marriage; and therefore a general clause, *de non alienando, et non contrabendo debitum*, will never exclude them.

It was allowed from the other side, That an heir of tailzie, however strictly tied up, is still understood to have a power of endowing his wife and children with rational provisions: But it was contended, that the wife's share can never go beyond the TERCE, which is determined by the law to be a rational provision.

“ The Lords found, The bond of annuity is comprehended under the prohibitive clause in the tailzie; but sustained the said bond, in so far as the same can be supported by a terce.”

N° XCI.

31st January 1727.

*Competition DUTCHESS of Argyle, with MACNIEL of Loffet.*

*In what Cases a Decreet of Adjudication, without Charge or Infestment, is an effectual Diligence to carry a Right of Reversion.*

**I**N a contract of wadset, Killellan disposes his lands to Macniel of Loffet, holding feu of the disponer, for yearly payment of 2000 merks of feu-duty; and the clause of reversion obliges the disponent to renounce his right of wadset, upon payment of 5000 merks. The Dutchess of Argyle, and Macniel of Loffet, having both of them led adjudications against Killellan the reverser, the question occurred, “ If a simple adjudication, without a charge or infestment, was effectual to carry this right of reversion, so as to exclude all adjudications without year and day?”

And it was contended for the Dutchess of Argyle, who had an adjudication with a charge against the superior, but not within year and



and day of Loffet's, That her adjudication must be considered as the *first effectual*, with respect to the reverser's right, because the common debtor remaining still in the property of the lands, burdened only with a *pignus* or wadset, he cannot be denuded, but by infeftment; and therefore, a simple adjudication in this case, will convey no more than a simple disposition. Had, indeed, the lands been disposed, holding of the reverser's superior, nothing remaining with the disposer, but the naked *faculty* of redemption; this *personal* right might be carried by a simple disposition or adjudication without infeftment; but here the lands were disposed, holding of the reverser himself; his infeftment was not taken away by the wadsetter's, but both subsisted together; for a proof of which, when the wadset-right is renounced, the reverser will not need a new infeftment; whereas a reverser who has disposed his lands, to be holden of his superior, must have a letter of *regress* and a new infeftment. All which is to shew, that the reversion here is *real* in the lands, and cannot be carried but by infeftment; and that therefore, with respect to this subject, more than lands, a bare adjudication without a charge or infeftment, cannot be reckoned an *effectual diligence* in terms of the act 1661.

On the other hand, it was contended, That a decret of adjudication, without charge or infeftment, is sufficient to carry this right of reversion. To make out which, the common debtor's right of *superiority* in the lands, was distinguished from his right of *reversion*; the first subsisting by infeftment, it was yielded, could only be transmitted by infeftment; the other arising from a *personal obligation* upon the wadsetter in the contract of wadset, was a mere personal faculty, transmissible by a simple assignation or adjudication: For here it was noticed, the disposition was in form of an *absolute* conveyance; Loffet, the disponent, became thereby absolute proprietor of the lands holding of the disposer, and the right of redemption did not arise from any *quality* in the conveyance, but from the *personal obligation* upon the disponent, which he bound himself in by the contract. Where, indeed, the wadset is contrived in form of a *qualified* or *conditional* conveyance, consistent with the *radical* right of property in the person of the reverser, (see Lord Stair, tit. *wadsets*, § 1.) to fall *ipso facto* upon payment or consignation of the wadset sum; there the reverser continuing in the radical right and property of the lands, his right of reversion cannot be carried otherwise than by infeftment; and that equally, whether he disposes the lands holding of his superior, or of himself: But, as is said, where the reversion is not a *quality* of the right, but a *personal obligation* upon the proprietor, the right arising therefrom cannot be other than personal, and transmissible as all other personal rights are.

Hence it was contended, the proper distinction is not betwixt wadsets holding of the reverser, and holding of the reverser's superior; but betwixt wadsets where the conveyance is *qualified*, and where it is *absolute*, with a personal *clause* of redemption: In that case, the reverser remaining radical proprietor, needs no new infeftment when the wadset is extinguished; and his right of redemption being in consequence of his radical right of property, can only be carried by infeftment: In *this* case, the wadsetter is absolute and sole proprietor; and



and whoever has the right of redemption, must have the wadset conveyed to him, with new infeftment; which is the only way this case can be expedited, if that single instance be excepted, where the right of redemption is competent to the superior, who already standing infeft as *superior*, needs not a new infeftment as *proprietor*: And therefore, the reversion here being only a personal obligation upon the proprietor to denude, may be carried by an adjudication without infeftment, as well as by assignation.

“ The Lords found, That Loffet’s adjudication of the reversion of  
 “ the wadset-right, was sufficient to carry the same, without  
 “ necessity of infeftment or charge against the superior; and  
 “ therefore, preferable to posterior adjudications, with a charge  
 “ against the superior not within year and day.”

N<sup>o</sup> XCII.

January 1727.

Competition ELLIOT of Arkleton, &c. with MAXWELL, Fiar of Nithsdale.

*Registrate Reversions good against the positive Prescription.*

**A**DAM CUNNINGHAM of Woodhall, in the year 1633, was infeft by charter under the Great Seal, in the lands of Meikledale and Meikledale-hope, *heritably and irredeemably*; he conveyed these lands in the 1643, to Walter Scot of Broadhaugh, who was likewise publicly infeft; and in the 1669, Scot conveyed them to Elliot of Arkleton, who obtained also a charter from the Crown, with a *novodamus*; and upon these titles, the lands have been possessed by Arkleton as proprietor, ever since, till of late, that upon the faith of his right, several creditors having lent him their money, the apparent heir brought the estate to a sale for their payment; in the course of which process, comparance was made for William Maxwell, fiar of Nithsdale, and for him pled, That Adam Cunningham’s right was at first no more but a wadset, and that there was an eik to the reversion, made by contract betwixt the Earl of Nithsdale and Walter Scot the purchaser, from Cunningham, *anno* 1653, which eik was duly registrate; and that, therefore, the rights were all *qualified* by the reversion, even in prejudice of creditors and singular successors.

It was answered for the creditors and pursuer of the sale, That they had the benefit of a *positive prescription*, their authors having possessed for more than forty years, *viz.* from the 1669, by virtue of charters from the Crown absolute, without any reversion, and without any *document* taken upon any letter of reversion; and therefore, they were secure, both upon the words and intention of the statute, whatever action the reverser might have against Cunningham the granter of the reversion, or his heirs, or Scot who accepted of the right with the burden of reversion. The act expressly declares, “ That persons possessing for forty years without interruption, shall only be obliged  
 “ to produce a charter and seisin of the lands, or instruments of seisin  
 “ one or more, continued for the space of forty years.” Herein the law is positive, and makes no exception upon a reversion, registrate



or not registrate, but excludes every claim other than falsehood. It is declared, indeed, in the act, that registrate reversions shall not prescribe; but if the matter be narrowly considered, it will be found, that nothing is meant but the *NEGATIVE* prescription; for it is plain, the first part of the act, introducing the *POSITIVE* prescription of land-rights, is a perfect separate clause, from that which introduces the negative prescription of actions upon bonds, heritable bonds, reversions, contracts, &c. just as much as these two had been separate laws. The first clause is complete of itself, without any manner of exception, even as to reversions registrate; then comes the second clause, not by way of exception to the first, but as a new statute, "And sikklike, his Majesty statutes and ordains, that all actions, &c. shall be pursued within forty years." Then there is subjoined a particular exception as to reversions, "That actions upon reversions engrossed and registrated, ought to be perpetual." To fortify which, let it be considered, the other exceptions that are designed to be from the act in general, and not only from the negative prescription, are introduced in quite different terms: Thus with respect to warrandice, the words used are, "Excepting always from this present act, all actions of warrandice," &c. whereby, from the generality of the words, "from this present act," it is commonly thought, infestments of warrandice will not even be excluded by the positive prescription: So as to minors, it is declared in general, "That in the course of the said forty years prescription, the years of minority shall nowise be counted." And this variation of the expression, with respect to these two noted cases, which is done in a manner to relate to the whole body of the act, seems plainly to imply, that the exceptions with regard to reversions, only respected the *negative* prescription, and had no view to the *positive*. And there is good reason for making a difference; nothing was to be imputed to a person who had an infestment of warrandice, that he did not sooner prosecute his right, he was not *valens agere*: And as for minority, it is protected by every law: But the reverser hath himself to blame, who did not advert the right that he had given, should not be inverted from its proper nature, which was easy to do, and his negligence ought to prejudge himself alone. This then is no exception from the clause concerning the positive prescription, but in relation only to the negative. For illustrating this, it was urged, That the registration of the reversion can be no stronger, than if prescription of the reversion be interrupted by action or order of redemption: And if it be made appear, that the action upon a reversion may in law be preserved from prescription, and yet the positive prescription of the land-right take place, no difficulty can arise from this exception. Now, suppose the reversion not registered, but at the same time prescription of the reversion interrupted by diligence against the granter, this would not stop the *positive* prescription; and yet because of the interruptions, there was no *negative* prescription; it is apprehended the present case is just the same: The registration of the reversion, has the same effect with a perpetual and daily interruption of the prescription against the granter and his heirs; but no effect upon the positive prescription of the singular successor, possessing by  
virtue



virtue of charter and seisin, absolutely conceived without any incorporate reversion.

*2do*, If this matter were otherwise, and registrate reversions good against the positive prescription, then it follows, that the common and universal opinion of all purchasers as to their security, is imaginary; for here a forty years possession is no security at all; no purchaser can be secure, without reading over the whole records from the 1617 to this very day, and so in all time hereafter; were it a hundred years after this, every such purchaser must go through the whole records from the 1617, because it is uncertain but at some time an author of the seller's may have granted a reversion, which must be effectual against singular successors to the day of judgment. The same must happen as to every creditor pretending to contract with a debtor, upon seeing in his person a connected progress of land-rights for forty years; and so, in effect, there is an end of all commerce and security as to lands; for nobody will imagine it a possible thing, upon every occasion, to search over the whole records from the 1617; and therefore the interpretation of the law in that manner, seems to carry such difficulties along with it, that surely it never can go down, if the act admit of another sense or meaning, which, as is endeavoured to be made out above, it plainly does.

To the *first* it was replied, The exception pled upon, is not an exception from any particular clause, but from the act itself, and from the *positive* as well as *negative* prescription; as are all the exceptions subjoined. "Reversions incorporate within the body of the infeftments, used and produced by the possessor of the lands for his title of the same," are such as every one must admit to be free from both prescriptions; and *reversions registrate* are joined in the same sentence and put upon the same footing. And there is good reason the positive prescription should have no place against reversions registrate, more than where engrossed and used by the possessor for his title, upon this principle, "That no man can prescribe contrary to a quality in his right." Now, the registers being designed for publication, every thing therein contained is presumed to be public; so that one possessing by virtue of a right, whereof there is a registrate reversion, is presumed to be conscious that his right is qualified, equally as if the reversion were engrossed; and in neither case will be understood to possess *eo animo* as absolute proprietor, without which *animus* there can be no prescription exclusive of the reversion.

To the *second* this reply was made, That it is highly reasonable, a purchase made upon the faith of the records, meet with all favour the law can afford it; but even at first view it must appear incongruous, that one purchasing contrary to the express admonition of the records, should plead favour, merely because it is a little troublesome to look them over. But let it be considered, no purchaser imagines himself safe, with a bare infeftment and forty years possession, without going to the records; for one article, there being many sorts of interruptions, sufficient to stop prescription, not so easily found out as reversions, though the records be searched back even as far as the 1617. There is equal difficulty in finding out infeftments of annualrent, which may be kept alive 100 years by minorities. Infeftments of warrandice will take place in many cases, a  
long



long time after the date of the infeftment, and the fame in inhibitions and other diligences; fo that to conclude, the rule is the fame in reverfions, as in other cafes, that whofo pretends to purchafe with fafety, muft have recourfe to the records.

“ The Lords found, That the reverfion being regiftrate in the “ register of feifins and reverfions, does not prefcibe.”

N<sup>o</sup> XCIII.

16th February 1727.

FERGUSSON of Auchinblain, *contra* Mr QUINTIN MALCOLM.

*A Bill payable at a certain Day, needs not be prefented by the Porteur before the Day for Acceptance.*

**A** BILL was drawn in the ifle of Man, 25th May 1720, by Mr Quintin Malcolm, upon John Fergusson, merchant in Ayr, for the fum of L. 73 Sterling, payable to Mr William Flood, merchant in Dublin, on the 1st September thereafter, at the houfe of Mr Davie, merchant in Dublin; and farther bearing, “ to ftate the fame to “ account as *per advice*.” This bill by indorfation coming into the perfon of Auchinblain, he infifted in a recourfe againft Malcolm the drawer, the bill upon its falling due having been regularly protefted for not-payment againft John Fergusson, upon whom it was drawn.

The defence was, That John Fergusson was broke with the drawer’s effects in his hands; and the poffeffor could have no recourfe againft the drawer, in that he had not done fufficient diligence; particularly, that he did not prefent the bill, to be accepted by John Fergusson, having never applied to him before the day of payment. And the defender urged in the general, That it is an indifpenfable duty in every fort of bills, to offer them to be accepted, and in cafe of non-acceptance, to proteft. And he endeavoured to make it appear, that he fuffered by this neglect; for if John Fergusson had accepted, there would have been ready accefs againft him, immediately after the day of payment, to make the bill effectual: If he refufed to accept, the drawer being duly advertifed, would have taken care to draw his effects out of his hands.

On the other hand it was pled, *1mo*, Where a bill is drawn, as *per advice*, payable at a day certain, it is the drawer’s bufinefs to give advice of the draught; becaufe wherever that claufe is, the perfon on whom the bill is drawn, is neither bound to accept nor pay, unlefs advice be given. The poffeffor then of fuch a bill reasonably fupposes, that he to whom the bill is directed, is acquainted of the draught, in order to his making provifion for payment: And as the drawer and perfon drawn upon are underftood to be in a correpondence, the poffeffor is likewise in reafon to fuppose, that the drawer will be advifed by his own correpondent on whom he drew, whether the bill is to be honoured or not. *2do*, It was pled, That it would make no alteration, fuppose the claufe *per advice*, had not been in the bill, which was made out from confideration of bills, payable on or fome time after fight; in which the poffeffor may lengthen out the term of payment as long as he will; and if he fail to prefent timely,



ously, it is just he himself, not the drawer, suffer by the omission; but where the money is payable, at a precise day of the drawer's own naming, the obtaining or not obtaining acceptance, neither lengthens nor shortens the day of payment; and the drawer is not one bit better of acceptance, if the person drawn on fail before that time. He has therefore no reason to complain of the *porteur*, that made no demand before the day of payment; and if, in the mean time, the person on whom the draught is made, become bankrupt, the loss must lie upon the drawer, who gave his debtor so long a day, not the *porteur*, who was not guilty of any omission.

"The Lords found, That the bill being drawn, payable upon a day and place certain, there was no necessity of a protest for not-acceptance."

And upon a reclaiming petition and answers, the Lords considering, that the bill was drawn payable in Ireland, a foreign part, and that he who was to be acceptor resided in Scotland, adhered to the former interlocutor.

N<sup>o</sup> XCIV.

17th February 1727.

Competition SINCLAIR of Southdun, and the other personal CREDITORS of Sir William Keith of Ludquhairn, with Lady KEITH of Ludquhairn.

*A Wife consenting to Infeftments of Annualrent upon her Jointure-lands, and the Annualrenters thereby satisfied and paid, they must assign her to any other Subject in which they were infeft, in order to relieve her of what she suffered, by yielding them the Preference.*

**B**Y a charter from the Earl Marfhal, several lands are disposed to Sir William Keith, particularly the lands of Boddum, in conjunct fee and liferent, with Dame Jean Smith his wife, for her life-rent-use of the said lands of Boddum, whereupon Sir William and his Lady are infeft 1692. Some time thereafter Sir William contracted great debts, and granted heritable bonds upon the lands of Boddum, with consent of his Lady, "For all right, title and interest of conjunct fee and liferent, she had out of the said lands." After Sir William's decease, the creditors came into a ranking, where the annualrenters were preferred to the Lady by virtue of her consent; but the Lady insisted, that in so far as she or the factor (the estate being sequestered) should make payment to these annualrenters, out of that fund in which she was truly preferable, she ought to be assigned by them to so much of the annualrents, in order to operate her preference in the price of the estate, preferable to the personal creditors, who had done diligence by adjudication, so as to recover the full value of her liferent.

This was opposed by the creditors adjudgers, who contended, *imo*, That the Lady's consent to the annualrenters preference, was *simple* and *absolute*; that she could have no recourse against her husband's heirs, for what she suffered by consenting to these annualrents, far less against his creditors. Indeed where a relict is infeft in an *annuity* out of lands, *quæ afficit unamquamque glebam*, and has consented to heritable



ritable debts, which may restrict her annuity, it is a question if she may not, in so far as the annuity is restricted, bring the deficiency or inlakes to be a real burden upon the ground, in the same manner, as the subject out of which her annuity was constitute, had not been originally of the extent of the annuity; but in the case of a *liferent-locality*, which of its own kind is a right of property, the wife's concurrence and consent with the husband, in alienating the subject, must as much restrict and diminish her right in the subject, as the husband's estate is diminished and restricted by an alienation apart. And in so far as the creditors can discover, it never was made a question, but if the wife had consented with the husband in an absolute disposition of a part of these lands, over which her *liferent-locality* was constitute, her *liferent* would thereby be restricted *pro tanto* of the alienation, without a possibility for her to recover any sum of money equivalent to the right renounced. If this holds in absolute alienations, there is no reason why it should not likewise hold in infestments of annualrent; and therefore, in the present case, the Lady's consent can afford her no recourse against her husband or his creditors, whether directly upon pretence of eviction, or indirectly, by obliging the annualrenters to assign.

Answered for the Lady, *Donatio nunquam præsумitur*; when a wife consents to the alienating or burdening her *liferent-lands*, to assist her husband in his necessities; there is no presumption that she designs *absolutely* to give away, more than if she had granted infestment in her own heritage for her husband's debts. These, all of them are of the nature of *cautionary* engagements, implying a *recourse* for *recompence*, from the very nature of the thing.

The creditors pled in the *second* place, There is no obligation upon the annualrenters, upon drawing their payment, to assign to the Lady; and supposing their voluntary concurrence, the law stands in their way, which hinders preferable creditors, by arbitrarily granting assignations, to prefer one subaltern infestment to another. These annualrenters have a preference, both upon the fee and the Lady's *liferent* of the lands of Boddum; they cannot arbitrarily burden either of these subjects, but if they draw their whole share out of one, must assign proportionally against the other; so that upon the event, each may be burdened in proportion to his subject. If therefore the annualrenters grant assignation of their annualrent-rights to the Lady, it can only be proportionally, not for the whole.

To which it was answered, The present case is not that of two infestments, in two different subjects, and a preferable catholic infestment over all; the Lady notwithstanding her consent, by the priority of diligence is still preferable: If there is a *private paction* betwixt her and the annualrenters, that has no effect but betwixt themselves, and can never produce a *jus quasitum* to the adjudgers, as if the annualrenters had a catholic preferable infestment. *2do*, Allowing the consent gave an *ipso jure* preference to the annualrenters, which the adjudgers could plead upon, it would avail them nothing in this case; for here the annualrenters stand bound in an *implied* obligation, to assign to the *liferentrix* upon payment; which obligation is also inferred, from the nature of the cautionary engagement: The Lady impledged



pledged her liferent-lands for her husband's debts; or which comes to the same, she consented to the creditors preference in these lands, for their security and payment; it is not conceivable, but in this transaction she designed herself a relief, as far as was consistent with the preference of these creditors, whose security was in view; and to this relief the creditors, who reap the benefit of her funds, are bound *ex bono et equo* to contribute, as far as is consistent with their own interest. "Hence arises the obligation upon creditors, in all transactions, where one person intervenes for another, cautionary or the like, to assign upon payment, to the person intervening for his relief." If now the annualrenters became implicitly bound, upon the liferentrix her consenting to their preference, to give her assignations for her relief; when they fulfil their engagements, and the assignations are granted, there is nothing like an arbitrary preference of one subaltern interest to another; if the adjudgers plead upon the consent, they must take it with its *implied* condition, *sciz.* the obligation upon the annualrenters to assign; and they have no sort of reason to repine, since they are not in a worse case, than if the consent had not intervened.

It was pled in the *last* place, There are no *termini habiles* here for an assignation; for in so far as the factor shall make payment to the annualrenters, the annualrent-rights are in so far extinguished, without a possibility of being assigned.

Answered, The sums paid by the factor to the annualrenters, do properly belong to the liferentrix, which indeed by paction she is bound to communicate to them; but if they go about to uplift as in their own rights, her liferent-right stands in the way; and if they again offer to subsume upon her consent, the answer will be, that the consent establishes not the annualrenters in an *ipso jure* preference; it means no more, than if the liferentrix had obliged herself to communicate to the annualrenters, what she should uplift by virtue of her preferable right, till they were satisfied and paid; or more compendiously, allowed them in her name to intromit; which intromission can never operate an *ipso jure* extinction of the annualrent-rights, since these rights are not the *title* of the intromission, but a power derived from another; much less will the factor's payments operate an extinction, for the factor pays in name of the Lady; and payments in this shape, are of the nature of cautionary payments, upon which assignation is always competent; therefore, as from the nature of the transaction, the creditors are involved in a reciprocal obligation of assigning to the liferentrix upon payment, she is well entitled, both in strict law and equity, to stand in the way of their intromissions or payment, unless they will perform their part, by granting assignations.

"The Lords, in regard both the heritable creditors and the Lady  
 "(supposing she had given no consent to their preference) would  
 "have been preferable to the other creditors, found, That in  
 "so far as the creditors, to whose rights the Lady is consenter,  
 "prejudge and hinder her to draw her full provision out of the  
 "subject and price thereof, that she is preferable to the hail  
 "other creditors, to whose rights she is not consenting, because  
 " of



“ of the priority of her infeftment, for the deficiency of the faid  
“ liferent-provifion.”

Here the preference was directly granted, without the circuit of an affignation, according to the rule, “ That in competitions every right is held as made up, which actually made up  
“ would found a preference.”

N<sup>o</sup> XCV.

February 1727.

ALLAN MACDOUAL *contra* Colonel MACDOUAL.

*A Sum of Money provided to the Heirs of a Marriage, found to divide  
amongst all the Children equally.*

**J**OHN MACDOUAL of Ardincaple, having a fon and other children of a firft marriage, did in his fecond contract of marriage, make the following provifion to the children of the marriage, “ And further, the faid John Macdoual binds and obliges him, his heirs and  
“ fucceffors to his lands and heritages whatfoever, to provide, fecure,  
“ and make payment and fatisfaction to the heirs to be procreate betwixt him and Anna Campbell, of the fum of L. 1000 Scots, and  
“ that at the deceafe of either of the fponfes.” There being two fons of this marriage, the eldeft ferved himfelf heir of provifion, and uplifted the whole fum of L. 1000, whereupon the fecond brought a procefs againft him, to account for the half; and the queftion arofe upon this point, Whether the forefaid provifion of L. 1000, to the heirs of the marriage, did belong to the eldeft fon as heir of the marriage, or if it muft divide amongst all the children.

It was pled for the purfuer, That the word *heirs* is a general term, belonging equally to fucceffors in moveables and in heritage, as is plain, becaufe where a fum is provided to heirs and affignees, and executors not mentioned, it will fall to the executors, as *baredes in mobilibus*. And hence, in confequence of fuch a claufe as that in difpute, the fame reafon that makes heritage go to the heir properly fo called, will carry fums of money to the whole children equally: For where lands are provided to the heirs of the marriage, the heir properly fo called is indeed preferred, but not directly from the force of the claufe, but becaufe he would have fucceeded however in that fubject by the provifion of law; and nothing appears from the general term of *heirs*, that can be interpreted to fet his right afide. The very fame way where a fum of money is provided to heirs of a marriage, the whole children muft be entitled to it, as *heirs* in that fubject. 2<sup>do</sup>, Whatever be the proper fignification of this claufe, the father’s intention in this circumftantiate cafe, was certainly to bring in all the children of the marriage equally; for where there could be no poffible view of eftablifhing a family, is it credible, that of a fmall provifion of money naturally divifible amongst all the children, the father could intend the whole to any one child, exclusive of all the reft? This cannot be imagined; and if the father’s intention is certain, no matter what terms he made ufe of, proper or improper.

Answered to the *firft*, *Heirs* indeed is a general term, comprehending both *heirs* and *executors*; but *heirs of a marriage* is not a general term



term, it can have but one precise meaning, because *executors of a marriage* is not a *nomen juris*. And here is the error of the pursuer's reasoning; for does it follow, because under the general word, *heirs*, *executors* are also comprehended, therefore *heirs* does also mean the whole children of a marriage, in opposition to the heir strictly so called? To the *second*, answered, Where words are express, as they are certainly in this case, there is no place for conjectural meanings.

"The Lords sustained process."

N° XCVI.

28th June 1727.

GILBERT GRIERSON *contra* Earl of SUTHERLAND.

*Bill accepted, without being addressed to any Person.*

**T**HE present Earl of Sutherland, when Lord Strathnaver, did, upon the 22d October 1702, draw a bill for the sum of 2400 merks Scots, payable to the Earl and Countess of Sutherland; and adds, "This with their receipt, shall oblige me to repay the like sum to you or your order." This bill wants the address, but was notwithstanding accepted by David Sutherland of Kinnauld, and indorsed upon the back, by the Earl and Countess of Sutherland to James More, who underneath acknowledges the receipt of the contents: Whereupon David Sutherland the acceptor retiring his bill, indorsed it again to Sir Robert Grierson, from whom it was derived to the present pursuer, who insisted in a process against this Earl of Sutherland the drawer of the bill, upon his above mentioned obligation.

It was first excepted against the bill, That it was addressed to no body; that the acceptor ought to be fully designed, to prevent uncertainty; that custom has established this, which is the mother of bills; and therefore, without it, the bill is not complete, and cannot be the subject of an action or diligence.

Answered for Mr Grierson, Albeit the bill was not directed to David Sutherland, this was supplied by the acceptance; and seeing *constat de persona*, the objection was of no moment, no law having established this as a necessary solemnity of a bill; it is sufficient that there is an acceptor, to make it complete; and Mr Forbes in his treatise on bills, § 6. says, "That a bill though not addressed to the acceptor, may be accepted by him;" which he supports by the opinion of *Marius*, a noted author on the subject of bills: It is believed, not to be a case only in imagination, that a bill may be directed to one, and another step in and accept it; which acceptance would be good to bind him, and give him action for repayment. But whatever is in that, the direction is no more than an ascertaining of the person to whom the bill is to be presented for acceptance; and when that direction is wanting, and an acceptor appears, it must be presumed, that the direction was given by the drawer to the possessor, and intimation to the person who accepts, which is sufficient to constitute the contract; so that an action may be founded upon it.

"The Lords repelled this exception."

3 B

N° XCVII.



## N° XCVII.

*Obligements to repay engrossed in a Bill, if indorsable.*

**I**T was excepted in the *next* place, That the bill being indorsed by the late Earl and Countess of Sutherland, to James More their servant, who in consequence of it, received payment, the precept became void, and could not again be transmitted by indorsation, the obligation to repay being a subject that could only transmit by assignation, and not by indorsement.

To this answered, That the bill bearing an obligation to repay the sum to the acceptor or his order, shows it was intended to be transmitted in the common way of bills ; that this is not in the case of a common bond, it is in form of a bill, and the proper subject of them : Nor is there any thing extraordinary or unusual, that the obligation to repay the money drawn for, should pass by indorsation. It cannot be refused, that the possessor of a bill can by indorsement transmit the action of recourse against the drawer, which is but an implied obligation to repay the money in case of non-acceptance, or failure of payment when it is accepted ; and the argument would be every bit as strong, nay much stronger in that case, why an assignation should be necessary, in regard when the bill was never accepted, all the essentials of the contract did not concur ; and that in effect, the action did arise only from the receipt of money upon the part of the drawer ; which is a better exception to its passing by indorsement, than that payment had been made upon the draught, which is said to have extinguished the bill ; for though the obligation upon the acceptor to the possessor was at an end, the obligation upon the drawer to the acceptor remained ; and the obligation is what would have been implied, unless the bill had expressed value in the acceptor's hands ; which therefore might well be expressed in the bill itself, and being expressed, and taken to the drawer or his order, it may be transmitted by indorsation. If the obligation given to the acceptor had been of a nature foreign to that of bills, the argument for the necessity of assignation would be of greater force ; but as in every case the drawer is bound to repay the acceptor, where there was no value in his hands ; the expressing what is implied, and making it reach not only to the acceptor but his order, does not at all debord from the nature of a bill. But *2do*, Allowing the obligation in dispute to be of the nature of an ordinary obligation, having nothing of the force or privilege of bills, the indorsation falls yet to be sustained, not indeed as a proper indorsation, but as virtually and formally a bill, and consequently an implied assignation, as all indorsations truly are, having the essentials and even the form of a bill. To illustrate this, let it be supposed, that instead of a formal assignation, any creditor in a liquid bond writes a formal bill upon the back of the bond, addressed to his debtor, thus, " Sir, Pay to Titius or his order, the sum of L. 100 Sterling, value in your hands by the within bond." This no doubt is an effectual bill, and equal to an assignation.



nation. Does it make an alteration, if instead of expressly mentioning the L. 100, the bill were shortly conceived thus, "Pay the with-  
" in contents to Titius?" If the former was a bill, this must be the same; and therefore all indorsations (which this last example is) are truly and really bills; and so the indorsation in question, had it not even related to a bill, would be good as a virtual bill, and an implied assignation.

Replied to the *first*, Obligations to repay, whether implied or expressed in the body of a bill, are only of the nature of a common ground of debt, which though vouched by the bill and receipt upon it, has in no country been considered, as having the nature or privileges of a bill-debt: Accordingly, when the statute 1681 is looked into, it will be found, that nothing there is indulged with the privileges, but the obligation upon the acceptor and drawer to the possessor; by no means the obligation that might arise to the acceptor for repetition against the drawer; that was not understood to arise from the bill, as the privileged vehicle of commerce, but to arise from the common law *ex mandato*; and therefore was left to the disposition of common law. Replied to the *second*, The form of bills is strictly to be adhered to, of which form indorsations are not. Assignations are of as great consequence as bonds; and if a simple indorsation, wrote by nobody knows who, without witnesses, or any one solemnity required in law, should be found good to convey bonds and other writs, as well as bills, it would be the same, as if the Lords did find, that assignations, translations, and other such writs were to be excepted out of the 5th Act, *Parl.* 1681, anent the solemnity of writs.

"The Lords repelled also this exception, in respect the obligation  
" to repay, was engrossed in the bill, and that the indorsation  
" implied an assignation."

N<sup>o</sup> XCVIII.

25th July 1727.

CUNNINGHAM of Enterkin *contra* his CURATORS.

*One cannot quarrel his Curators, for concurring with him in a Deed, which  
be omitted to revoke intra annos utiles.*

**E**ENTERKIN having insisted against his curators for damages and interest, as consenters with him in a deed, whereby he pretended to be enormously lesed; the curators defence was, That he had not revoked or reduced the deed *intra annos utiles*; and as he could not now insist against the person in whose favours the deed was granted, neither against his curators who consented to it.

Answered for Enterkin, He is not in an action of reduction against those who were beneficers by the deed in question, but in an *actio directa tutelæ* against his curators; these are different actions, having no connection or dependence one upon another; the one *must* be insisted in within the *quadriennium utile*, the other *may*, any time within the long prescription.

Replied



Replied for the curators, Enterkin cannot quarrel them, for concurring with him in a deed which he never revoked: The curators cannot be liable if he was not lesed; and if he has not revoked, the law presumes *præsumptione juris et de jure*, he was not lesed.

"The Lords found the curators not liable, Enterkin not having  
"duly revoked and reduced *intra annos utiles*."

Nº XCIX.

December 1727.

HENDERSON of Gairdie *contra* SINCLAIR of Quendal.

*Bills are sustained, though bearing Annualrent from the Date, and before the Term of Payment.*

SINCLAIR of Quendal being debtor for some feu-duties to Henderson of Gairdie, upon the 2d February 1725, accepted a bill for the bygones, payable 1st October thereafter, bearing interest from the date.

Against this bill, an objection of nullity was made, as not being of the proper nature of a bill, because it bore annualrent *in gremio*, not from the term of payment, but from the date. And it was urged, that bills are *stricti juris* writs of a certain form and tenor, against which there is no liberty to transgress: But here the clause objected against is even contrary to the nature of bills, which bear annualrent after the term of payment only, *ob moram*, but never from the date. And the case was cited betwixt Innes and Flockhart, determined January 1727, where a bill was found null, "as bearing annualrent from the term of payment, and a fifth part of the sum as penalty." And if it be a nullity to stipulate annualrent from the term of payment, much more from the date.

Answered, That it is agreeable both to practice and the nature of bills, that they contain clauses for annualrent from the date. And now that debts betwixt creditors and debtors are frequently transacted by way of bills; since by the acceptance the acceptor acknowledges himself debtor, it is an easy transition, that he also bind himself for annualrent. And were not this sustained, it would go harder with debtors; for instead of giving a long day to pay, this would oblige creditors to draw their bills payable upon sight, in order to bear annualrent. In the decision cited, it was the penalty alone that prevailed upon the Judges not to sustain the bill; for a penalty is in every view contrary to the nature of a bill, the essence of which consists in its being a permutative and strictly onerous contract: Nor is it a good answer, that penalties are generally restricted to the expence and damage, for this is a stretch *ex nobili officio*; and if an adjudication were led upon such a bill, the whole penalty would be accumulated: And therefore if a bill with a penalty were sustained, there would be the same reason for sustaining a donation by way of bill, or an obligation *ad factum præstandum*; for they are all equally contrary to the design and nature of bills. That it was the penalty alone that annulled the bill, will further appear, in that annualrent was



was only stipulated from the day of payment. Now, whatever be said with respect to a clause of annualrent from the date, it can never do harm to stipulate annualrent from the term of payment, "for whatever follows from the nature of a writ, may surely be expressed in the writ."

"The Lords repelled the objection upon the nullity."

N<sup>o</sup> C.

2d January 1728.

Competition RICHARD WATKINS with Mr THOMAS WILKIE.

**I**N a competition among arresters, the Lords found in general,

"That arresters are to be preferred, according to the priority  
"of their arrestments and their diligences thereon, albeit  
"some of the arrestments were laid on before the term of payment of the debt arrested. As also, that they are to be  
"preferred, according to the dates of their arrestments and diligences, when the term of payment of the debts on which  
"arrestments are used, are past at the time of the competition;  
"notwithstanding that at the time of laying on the arrestments, the terms of payment of some of the arresters debts were  
"not come; or notwithstanding some of the arrestments were  
"on dependencies, which were closed, and the debts liquidated  
"before the competition."

N<sup>o</sup> CL.

2d January 1728.

Sir JOHN MERES *contra* the COMPANY of UNDERTAKERS for raising the Thames Water in York-buildings.

*Lis alibi pendens.*

**S**IR JOHN MERES, in order to recover payment of certain great sums, alleged due to him by the York-buildings Company, who have a considerable estate in Scotland, that could not be affected by legal diligence, but in consequence of a decret obtained in the courts there, brought an action against them before the Court of Session, concluding for payment of these sums. Against this action, the dilatory defence was objected, of a *lis alibi pendens*, *sciz.* in the Court of Chancery in England.

And in fortification of the objection, it was pled, *imo*, That every *litiscontestation* is a judicial contract, or *quasi* contract at least, whereby parties mutually submit the validity of their claim to the determination of that Judge before whom the cause is brought, and of those who by appeal or otherwise have a power of reviewing his sentence: Which more especially holds with regard to the pursuer or plaintiff; for it is of necessity that the defender submits, in all cases where the jurisdiction is competent; but the plaintiff brings his case before the court out of choice, which is as strong a *reference* to the court as can



be devised. And truly this defence of *lis alibi pendens*, is better founded than ordinary in the present case, where the Court of Chancery is the proper court for trying the cause; for England being both the *locus contractus*, and place of residence of the defendants, it is the place where the jurisdiction is *originally* and *primarily* founded; and that the defendants have a *forum* here, is *ex accidenti ratione rei sitæ*; a *forum* where execution only falls to be sought, in so far as the action is directed against the effects; and is not a *forum*, where the validity of the debt falls to be tried, except by way of *incident*, in order to explicate the power of giving execution against the *res sita*: And therefore where the question, as to the existence of the debt is pendent in that place, where the only *radical* and *original* jurisdiction (if we may so speak) lies; and that no other court has power to try the subsistency of the debt but by way of *incident*; it seems pretty reasonable, that the incident jurisdiction stop, until the original court give judgment on the principal question that is before them, to wit, the subsistency of the debt. 2<sup>do</sup>, The defence is also founded in common equity, that a defender may not be distracted and annoyed, by being carried from one court to another, and obliged to have his evidences, whether witnesses or writs, necessary for his defence, in different places, yea different kingdoms; yea in all the kingdoms of the world, where he may happen to have effects, at one and the same time; a thing which is naturally impossible, and which of itself shews the necessity, as well as reasonableness of the defence and rule; and shews, that this defence does not arise from the municipal laws of any country, but hath its foundation in the law of nature and nations; and therefore proponable every where, though the suits be pendent in different kingdoms, except it plainly appear, that the foundation of the defence to be made use of in one suit or kingdom is not necessary for opposing or defending against the suit carried on in the other.

Answered to the *first*, It is true, lawyers sometimes speak of a litiscontestation, as a contract or *quasi* contract; but that is no more but a sort of *fiction juris* in certain cases, used to explain some effects of a depending process, but is never looked upon as having the true effects of a real or *quasi* contract; for then the judgment pronounced behoved to be final, and the *res judicata* as an award of arbiters, would bar appeal, and be a good exception over all the world, which was never pled. The true ground of the objection, *lis alibi pendens*, is this: "When a pursuer chooses a court, before which to bring  
 " his action, wherever the sentence of that court will be *res judicata*,  
 " and be put to ready execution; in every such place he is under-  
 " stood to have given up his privilege of intenting over again the  
 " same action, and reasonably, since the effect could only be, to  
 " distract the defender by different pursuits, without doing the pur-  
 " suer any possible service, one decreet being as effectual wherever it  
 " reaches, as many." Whence it follows, that notwithstanding an action already intented, the pursuer may begin his cause over again, wherever the force of the sentence upon the first process reaches not; and that wherever the exception of *res judicata* is not competent, neither that of *lis alibi pendens*, which is plainly the case here; for however out of *comity* the Court of Session may give countenance to English decrees, and interpose its authority, to make them effectual  
 in



in this country, it must not from thence be imagined, that English decrees make a *res judicata* here, more than the decrees of France or Spain. All the effect *comity* has, is to introduce a presumption in favours of foreign decrees, that they are just and right; but still there is access to show the contrary, which must necessarily bring on a new process, and subject them to the review of our Judges; and when at last sentence is given in favours of the decree, the decree is not ordered to be put to execution, but the sentence of our own Judges upon the decree. So that in no shape does an English decree make *res judicata* in Scotland; nor of consequence, ought a depending process there, support an objection of *lis alibi pendens*, when the same process is intended here. To conclude with a general view of the matter, a creditor is entitled to recover payment out of his debtor's effects, wherever they can be found. A decree of the Court of Chancery cannot avail Sir John, to charge the real estate of the Company in Scotland; a decree of the Court of Session is necessary to that end, and both actions may regularly be carried on at the same time: Allowing therefore the Court of Chancery to have the *radical* and *original* jurisdiction, with respect to this process, and that it can only come before the Session by way of *incident*, which yet needs not be granted, because *locus rei sitæ* is as proper a foundation of a jurisdiction, as *locus contractus*. Allowing all this still, what good reason can be assigned for delaying Sir John's incident process here, till the event of that before the Chancery; when, after all, whatever be the judgment of the Chancery, in this country it will neither be a liberation to the defenders, nor a decret to the pursuer. To the *second* argument, The difficulty of answering to the same process in different countries at the same time, will have thus far an effect, that the defender will be allowed reasonable time to transport the materials of his defence from one place to another: No doubt this creates trouble, but parties must be disquieted till they pay their debts. The argument is of that kind, that by proving too much, proves nothing at all; for if that kind of disquiet were a good foundation for the exception of a pendent suit in another kingdom, it ought to be good, not only where a suit was depending in another kingdom betwixt the same parties in the same cause, but where the defendant was sued upon any ground, or indeed by any person, because it is troublesome to attend suits in different kingdoms; only with this difference, that the same writings, if the subject was the same, and the same witnesses cannot indeed attend at one and the same time in different kingdoms. But this makes no substantial difference, because this can be supplied by *commissions*, *excerpts*, or *exemplifications*; or at most have the effect, to procure some reasonable delay, if proof be brought that it is impossible instantly to produce the writs or witnesses before the Court.

"The Lords repelled the defence."



N° CII.

27th January 1728.

Competition JOHN MURRAY with NEILSON of Chapel, and LANIRK of Ladylands.

*Confusion makes not an absolute Extinction, but only a Suspension of Obligations.*

**I**N a competition betwixt these parties, about the lands of Conheath, Neilson and Lanirk's titles, being apprisings deduced against the lands of Conheath, bought in by Elizabeth Maxwell the apparent heir, and conveyed from her to these purchasers; it was objected against the apprisings, that they were extinct *confusione*, being bought in by the apparent heir, during the legal, after she had behaved as heir, liable thereby to all her predecessor's debts, and to these apprisings among the rest; whereby there came to be a *confusion* of debit and credit in her person.

To which it was answered, That apprisings were never thus understood to be extinguished; witness the noted case of an apparent heir, possessing by virtue of an adjudication led upon his own bond, which was never understood to be an extinction, though a stronger case than that in dispute. See *Lord Stair, l. 1. t. ult. § 9. in med.* And though such a possession, since the act of federunt 1662, did infer a passive title, nevertheless the adjudication was a good title, whereupon to possess the estate, and even to dispose upon it by sale, which could never be quarrelled by a succeeding heir: And indeed the same thing continues to be law still, even after the act 1695; for that law only makes the heir possessing upon such a diligence *passive* liable to the debts, but does not annul the diligence. And the true reason of all is, that *CONFUSION* is not a proper *EXTINCTION*, but only a temporary *SUSPENSION*, while the *debit* and *credit* continues in the same person; for though the same person can support the legal characters, at the same time, both of creditor and debtor, so as to preserve the debt from an *ipso jure* extinction; yet because one cannot pay to or discharge himself, the debt must stand suspended as to execution, during the time the same man is both debtor and creditor. But whenever the *confusion* ceases, the debit and credit falling in different hands, the suspension ceases at the same time; the debt revives, and has its force as before the suspension. And to this purpose *Lord Stair* in the forecited place expresses himself, "If by different successions," says that noble author, "the debtor and creditor should become distinct, the obligations would revive, as in many cases may occur; and so *confusion* is not an *absolute extinction*, but rather a *suspension* of obligations."

"The Lords repelled the objection."

N° CIII.



N<sup>o</sup> CIII.

January 1728.

Competition betwixt Sir JOHN SINCLAIR and HELEN GIBSON.

*Bonds heritable by Destination, not confirmable by an Executor-creditor.*

THE now deceased Sir Edward Gibson, was fiar of several bonds, devised "to him and his heirs-male; which failing, to his sister Helen Gibson, and her heirs-male; which failing," &c. anent which bonds the question occurred, "If they were confirmable by an executor-creditor of the defunct?"

Sir John Sinclair, the executor-creditor, pled upon the act 32. Parl. 1661, in which "sums lent out upon bond, containing clauses for payment of annualrent and profit, were ordained to be holden and interpret moveable bonds, excepting the cases following, viz. that they bear an express obligation to infest; or that they be conceived in favours of heirs and assignees, secluding executors." So that however these bonds be destinated, they continue moveable *quoad creditorem*, as coming under neither of the exceptions in the act. If a subject be otherwise moveable, a destination alters not its nature, being only intended to point out the successor; and though that successor is preferred to the executor of the defunct, that flows from the will of parties, not from the nature of the subject, which remains moveable, insomuch that the creditor-fiar may rest upon it; and consequently it is confirmable by his executors-creditors. This seems to be Lord Dirleton's opinion, and is expressly Sir James Stewart's upon the article, *Bond heritable*, p. 17. where he lays down the rule, "That a substitution does not so far alter the nature of a bond, as to make it heritable, but that the marks of a bond's being heritable or moveable, should be taken from the act of Parliament; that is, where there is no clause for infestment, or expressly secluding executors, such bond should be esteemed moveable and testable, and consequently confirmable by the executor-creditor."

On the other hand, it was contended for Helen Gibson the substitute, No good reason can be assigned, why this case should not be brought under the exception in the act, of bonds "conceived to heirs and assignees, secluding executors." For are not the bonds in question conceived to heirs and assignees, secluding executors? truly as much as these very words were expressed in the bonds: There is no charm in the words *secluding executors*; and it is not to be imagined, that the Legislators designed to put the difference of a subject's being heritable or moveable, upon the form of using certain indifferent words, neglecting the true state of the conveyance, which is the thing that falls naturally to determine the point. But, 2<sup>do</sup>, There is another medium upon which this question falls to be determined, *sciz.* That these bonds can only be carried by *service*, which is contended to be incompatible with *confirmation* of any sort, whether of nearest of kin, or creditors. There are two methods known in our law of making up titles to a defunct's effects, *confirmation* and *service*; the last is necessary in all cases, where the person claiming is to REPRESENT the defunct, where he derives his right from him, and has



no title but *as* coming in his place ; there being no other form known in our law of REPRESENTATION, but by service ; so that service is not only necessary in the conveyance of heritable subjects, but in all subjects heritable or moveable, where a *succession* is established, and where of consequence the right can only be carried by REPRESENTATION. There are other subjects which are claimed, not by any right *derived* from the defunct, but *jure proprio* ; which is the wife and children's case, with relation to the moveables : For even the nearest of kin take not the defunct's third, as *representing* him, but *qua* nearest of kin, and in their own title ; the law having established, " That the dead's part belongs to the nearest of kin *qua* such, unless otherwise disposed upon by the defunct." And this according to the well known principle, " That there is no REPRESENTATION in moveables." Now in all these confirmation takes place, which has no relation to a *succession* by *representation*, but belongs to the *office* of executry : For since it is inconvenient, where so many have different interests in a perishable subject, that each be allowed to put forth his hand, the law has prudently introduced, for the benefit of all, a common *trustee*, who alone is to intromit and be accountable. If this be a just view of the affair, it was even an extension to allow a creditor to confirm, who has no *special* interest in his debtor's moveables, more than his heritage ; indeed a necessary extension, where there is not another executor, because in these circumstances no other form of diligence has been devised whereby creditors can affect their defunct's moveables. But since the effect of a destination is to establish a *succession*, a REPRESENTATION, were the destination even of a medal, jewel, or other *simply* moveable subject, it must go by a service, and is incapable of confirmation ; since no body can have an interest in it *jure proprio*, but only *as* coming in place of the defunct proprietor ; and if not confirmable at the instance of the nearest of kin, far less by a creditor, who in these circumstances wants not a *habile* diligence to affect the subject ; for here he has the substitute whom he can charge to enter heir, and upon his renouncing, the way is patent to an adjudication of the subject, as a *hereditas jacens*.

" The Lords found the bonds in question not confirmable."

N° CIV.

2d February 1728.

Lord STRATHNAVER *contra* Duke of DOUGLAS.

*Action competent against an Heir to purge the Tailzie of his Debts, which he laid upon it contrary to the Will of the Tailzier.*

**T**HE deceased Jean Countess of Sutherland, proprietor of a small estate near the village of Inveresk, executed a disposition and tailzie thereof in favours of her son Archibald Earl of Forfar, and the heirs-male of his body ; which failing, to William Lord Strathnaver, and the heirs-male of his body ; which failing, &c. In these lands the Countess thereby " obliges herself, her heirs and successors, " under the conditions therein expressed, duly and lawfully to invest " the said Archibald Earl of Forfar, and the other heirs of provision ; " and



“ and for that effect to grant procuratories, precepts and other writs  
 “ necessary.” And in the procuratory of resignation contained in  
 the said tailzie, provides and declares, “ That it shall not be in the  
 “ power of the said Archibald Earl of Forfar, and the heirs of pro-  
 “ vision above written, to contract debts upon the foresaid lands, or  
 “ others above disposed; or to affect the same with any sum exceed-  
 “ ing two years rent for the time.” To this is subjoined, “ That it  
 “ should not be in the power of the said Archibald Earl of Forfar,  
 “ and his heirs of provision, to give away, dilapidate or impignorate  
 “ the said lands, nor to allocate, or to bestow them in fee or join-  
 “ ture to their ladies;” and in that case the tailzie is declared to be  
 void and null, in so far as conceived in favours of the person so act-  
 ing; and the next heir of provision is to succeed in his right and  
 place. This disposition, containing a clause “ dispensing with the  
 “ not delivery,” was found amongst the Countess’s writs after her  
 death, remaining in the naked state of a disposition, without any  
 thing done upon it.

Archibald Earl of Forfar, the INSTITUTE, having predeceased his  
 mother the Countess; his son, also Archibald Earl of Forfar, neglect-  
 ing the disposition of tailzie, served heir in special to his grandmo-  
 ther in these lands of Inveresk, *tanquam legitimus et propinquior hæres*,  
 and charged them with his father’s debts and his own, to a consider-  
 able extent. He having thereafter died without heirs-male of his  
 own body, the Lord Strathnaver, next *substitute* in the tailzie, served  
 heir of provision to Archibald Earl of Forfar the father, first *institute*  
 in the tailzie; and by the general service having established in his  
 person the procuratory, and the obligations relating to the entail,  
 brought an action against the Duke of Douglas, heir of provision to  
 the last Earl of Forfar in the family-estate, to disburden the tailzied  
 lands of the debts laid upon the tailzie by the said Earl, contrary to  
 the express intention thereof; concluding, that the pursuer, as by  
 the substitution he was creditor in these obligations, and might had  
 a competent action against the Earl of Forfar, as served heir of line  
 to the Countess, to resign in terms of the entail, and to relieve the  
 estate of his own debts, which he had brought upon it contrary to  
 the express mind and will of his predecessor; consequently his Grace  
 the Duke of Douglas, as served heir of provision in the estate of For-  
 far, is liable to the pursuer in the same relief.

The *first* objection was laid against the pursuer’s title in this shape,  
 That his service to the Earl of Forfar, institute in the tailzie, could  
 avail him nothing, because the Earl never had any right in his per-  
 son, having predeceased his mother, without *accepting* the disposition  
 conceived in his favours. And it was pled, That in all substitutions,  
 if the institute *accept* not, the whole must fall to the ground, there  
 being no other method for a substitute to take the right, but by a ser-  
 vice to the institute, who never having accepted, never had a right.  
 And this led into a general point, “ If Lady Sutherland could put a  
 “ fee in her son’s person, so as to make him proprietor, without any  
 “ consent or acceptance of his?” The Duke insisted that she could  
 not, otherwise the most absurd consequences would follow; particu-  
 larly this, What if by this disposition Lady Sutherland had burdened  
 Lord Forfar her son with the payment of L. 5000 to Lord Strathna-  
 ver,



ver, or any other person? If the fee was in him by the single deed of Lady Sutherland making the disposition in his favours, then *as fiar* he became liable to every condition clogging the fee, consequently was personally liable to the payment of L. 5000: Now, if it is absurd that one shall be made liable *in infinitum* without his consent, it must follow, that without the Earl's acceptance there was no fee in him, and that therefore Lord Strathnaver could carry nothing by his service. It was urged, *2do*, upon this head, That the disposition having remained with the Countess of Sutherland undelivered until her death, became thereby only effectual, and could not produce a right in the Earl of Forfar, who died before her. And it was contended, That before delivery, or the death of the granter, no sort of right is conveyed, revocable or irrevocable; the deed or writ remaining still incompleated, though subscribed in the formallest manner: So that delivery or death are necessary, not to *prevent revocation* of a right already transferred, but to *transfer* the right itself.

Answered to the *first*, It is a general law of nature, "That one can bestow or transfer to another without his consent, though he cannot bring him under an obligation:" For it is lawful to do good to others without their concurrence, but not to do harm. And hence it is that effectual conveyances are commonly made to infants or absents, they knowing nothing of the matter. Nor will the absurdity follow, that thus one may be made liable *in infinitum* without his consent; for it is not the simple *quality* of a man's being proprietor that subjects him to the conditions clogging the property, but his *consenting* to act as proprietor, and of consequence consenting to all the conditions: So that any person to whom a conditional property is conveyed without his concurrence, has his choice of two things, either to *renounce* the right, or to keep it with all its burdens. And were this matter otherwise, our law would be inextricable, especially in the matter of infeftments, where it is a maxim, "That one infeftment cannot be taken away but by another." Now, it is well known that by the forms of our Chancery, any one may be infeft without his consent: And if in such a case the person infeft were not fiar, the matter would be truly inextricable; for he could not convey, not being proprietor; and yet the infeftment must be conveyed, because one infeftment cannot be taken away, but by another. To the *second*, answered, A disposition the moment duly signed conveys a right to the disponent, being in its nature a completed deed. Indeed before delivery there is *locus pœnitentiæ*, a power of revocation, that the disponent may have all the advantages of deliberation; and this is the reason why the death of the granter, where there is a clause "dispensing with the delivery," is equivalent to delivery, because thereafter there is no revocation: But were delivery necessary to the *constitution* or *existence* of the right in the disponent's person, it would be hard to make this matter consistent, because death is not *delivery* real or symbolical; if there was no sort of right in the disponent's person before the disponent's death, it is not easily conceivable how it could come afterwards.

It was added by the pursuer, That this is all *ex superabundanti*; for with respect to him, it is no matter whether the Earl of Forfar had the fee of the obligation or not: If he had, Lord Strathnaver is his heir:



heir: If he had not, Lord Strathnaver has a direct interest as creditor, all the persons named before him having failed without establishing the *jus crediti* in their persons. And he endeavoured to make out this from the nature of tailzies, in which the *substitute* is as directly called in the second place, as the *institute* in the first. It cannot be doubted but Lady Sutherland, as she designed the estate of Inveresk for the Earl of Forfar, and the male heirs of his body, preferably to Lord Strathnaver; so she designed it for Strathnaver preferably to any other mortal: How then can it be said, if the institute neglected to accept, that the whole must be evacuated? Is not this directly against the intention of the maker? Was not Strathnaver called absolutely preferable to the Duke of Douglas and all others, whether the two Earls of Forfar should accept or repudiate the heritage? If this be unquestionable, then it follows in general with respect to all tailzies, "If the *institute* acknowledge the right, the person called in the second place is a proper SUBSTITUTE; if the *institute* repudiate, or according to the defender, if he neglect to accept, the person called in the second place cannot be a SUBSTITUTE, and therefore must be a CONDITIONAL CREDITOR, whose right is purified by the removal of the person called before him, without having the right in his person."

It was objected in the *second* place, This action is not competent against the Duke of Douglas, because it was not competent against his predecessor the Earl of Forfar; and that for two reasons, *1mo*, Because the Earl himself was creditor in the disposition of tailzie; and one cannot be bound to implement a deed in his own favours. *2do*, There is no clause prohibiting the altering of the succession; and it is a rule, that even an heir accepting, cannot be bound to implement at the suit of a substitute, where he has power to alter. And upon this second head it was contended, Though there is in the tailzie a prohibition to *contract debt*, and a prohibition to *alienate*, that will not amount to a prohibition to *alter the succession*; for there is nothing more settled amongst us than the different effects of clauses in entails: A clause "not to alter the succession," never was construed to import a restraint, either as to the *alienation*, or as to the *contracting of debt*; and yet both the contracting debts and alienating, are effectual alterations, and the strongest kinds of alteration of the succession: Just so, a clause "not to contract debt," never was construed to import, "that the heir of entail could not alienate;" all of these are quite distinct, and yet if the intention of the maker of the entail were not tied down by rules, so as that he is not understood to intend any thing that he has not expressed according to the proper forms of law, it would be impossible to maintain, that a man who inserted any one of these clauses, did not intend the whole: But a naked intention in such case signifies nothing, where the proper clauses are not used; *si voluit non fecit*: And the rules of law are the only direction in judging what he intended, and what he did not intend.

Answered to the *first*, There can be no doubt, but the Earl of Forfar was bound to fulfil this tailzie, according to the obligation which the granter laid upon herself and heirs, in order to secure the substitutes, who had each of them an interest in the subject, as well



as the institute: And the institute here was not bound to do a deed in his own favours; for he might, if he so pleased, neglect himself, and dispoſe directly to the ſubſtitute. But then even ſuppoſing he could not have been directly bound to fulfil, the ſubſtitute at any rate has an intereſt, that the tailzie be not evacuated; and this equally, whether the Earl of Forfar had ſerved heir to his grandmother or not: He could have purſued a registration of the tailzie, to prevent the ſubject from being carried off by the debts of the institute or others; he might, if neceſſity ſo required, to prevent the ſubjects going into decay, till his right ſhould take place, have applied for a factor, and put the ſubject under ſequeſtration. And if before registration, the proper creditors of the institute, or other apparent heirs of tailzie, ſhould have adjudged the eſtate in prejudice of the ſubſtitute, ſo far as theſe debts of his had gone to exhaust the tailzied eſtate, ſo far that would have made him liable to the ſubſtitute *in valorem* of theſe debts, and conſequently to have purged the ſubject of them. Answered to the *ſecond*, There is no reaſon given, why implied obligations ſhould be reſuſed their force in tailzies, more than in any other matter; if the mind of the tailzier be clear, it is no matter in what words it be expreſſed: And here the mind of the tailzier cannot be doubted of; for ſince ſhe has inſerted both a prohibition to *alienate* and to *contract debt*, either of the two implies “a prohibition to alter the order of ſucceſſion,” not only becauſe of the general rule, “*qui prohibet majus, cenſetur et prohibere minus*,” but becauſe the very ſcope and intention of the prohibition to alienate or contract debt, is no other, than to preſerve the ſucceſſion in the channel which the granter has deviſed; inaſmuch as it is not the affection to an eſtate, but the affection to the perſons who are in the granter’s eye to enjoy it, that moves any man to tailzie his eſtate, and lay a reſtraint upon his heirs.

It was objected in the *laſt* place, Though our law has allowed of tailzies, it has not provided ſuch an action as this, againſt the heirs of an heir of tailzie, contracting debts contrary to the proviſion of the entail: The irritant claules have been thought a ſufficient ſecurity for maintaining ſuch entails, and the forfeiture of the eſtate in caſe of contravention, a high enough penalty; and the act of Parliament has provided no other remedy. The Duke of Douglas therefore inſiſts, That however Lord Forfar may have contravened and incurred an irritancy, there lies no action againſt him upon that contravention. If Lady Sutherland did not ſecure her ſucceſſion in the proper way, by inſerting the proper claules, and recording the entail, ſhe had herſelf to blame; Lord Strathnaver muſt take it as he finds it; the law has introduced no perſonal action againſt the heir of entail contravening, but the declarator of irritancy allenarly; nor was there ever ſuch an action heard of in any age, either ſince the act 1685, or before: For at that rate, in every caſe, where a ſettlement is made with a claule, *not to alter the ſucceſſion*, if the proprietor ſell the eſtate, the next heir in the deſtination would have an action againſt the heir for the value: But ſurely the Lords will never give countenance to ſuch a claim: The law hath taken another method as to heritage, much more adapted to the nature of the thing, and even to the intention of parties who make entails, which is not to allow of



of personal action for value, but to provide a security against the alienation itself. And indeed the reason is very different here from what it is in moveables, where the main intention of the defunct is to benefit the legatar, by giving him a thing of such a value, which he may afterwards dispose of as he pleases; and if he get the value, the will of the defunct is looked upon as completed: But in tailzies of lands, the principal intention is, to preserve the estate to the heirs to perpetuity, and not to give the value to any one substitute; therefore the law is adapted to that intention, by giving a real security, not a personal action for the value upon contravention.

The pursuer answered, That after all is said, he is insisting in nothing but a common action for *reparation*: The Earl of Forfar, as heir of line to the Countess of Sutherland, maker of the entail, was obliged to fulfil the conditions under which she bound herself and her heirs, that the heritage should descend; instead of fulfilling these conditions, he burdened the heritage with his debt, and did thereby all in his power to disappoint the entail; do not the common principles of law dictate, that he and his representatives ought to make reparation to the substitutes for the damage he has done them, and for that reason purge the heritage of these debts? It does not admit of a question; and if the contrary were found, the act of Parliament 1685 would be of no significance to preserve a subject entailed; for an heir entering would have nothing to do, but omit inserting the irritancies which the law directs in the subsequent conveyances, and charge the estate with debts to the value; and having thus the price of the estate in his pocket, he could apply it in what manner he thought fit, as being subject to no action at the instance of the substitutes: And it is a jest to say, that this would be an irritancy of his right; for what does he suffer when he has got the full price of the subject, and at the same time shaken himself loose of the fetters put upon him, and disappointed the anxious settlement of the donor?

“ The Lords found, That the heirs of tailzie in the Countess of Sutherland’s disposition, could not alter the order of succession therein set down; and that the last Earl of Forfar, who was infest as the said Countess’s heir of line, was obliged to have resigned, in terms of the procuratory contained in the tailzie; and that the Duke of Douglas, who was heir of provision to the said Earl of Forfar, is thereby bound to disburden the said Countess’s tailzied estate, and to relieve her heirs of tailzie of the debts of the family of Forfar.”



N° CV.

15th February 1728.

Competition SKENE of Pitlour with FORBES of Kincairden.

*A Deed betwixt conjunct and confident Persons ; how far a Proof is necessary of the onerous Cause, otherwise than from the Deed itself?*

**J**OHN FORBES, a merchant of considerable stock and credit, obtained a disposition of the lands of Kincairden from his brother Sir Robert Forbes, bearing to be for a price truly paid ; and he got possession and infeftment above four years before Sir Robert's circumstances came any way to be suspected. Skene of Pitlour, who had an heritable bond from Sir Robert upon the same lands, anterior to the disposition, after Sir Robert's bankruptcy, in a competition with John Forbes the disponent, who had the first infeftment, objected against the disposition, " That it was granted to a conjunct and confident person, the debtor's own brother, in prejudice of an anterior lawful creditor ; and therefore void, unless the onerous cause be proved otherwise than by the narrative." And he pled it as a now established law, " That the narrative of a writing, in favour of a conjunct person, does not prove the onerous cause, but " that the receiver must instruct it otherwise ;" and that notwithstanding the words of the statute, laying the proof upon the creditors, which in so far is altered by practice. The disponent produced a retired cancelled bond, of the same date with the disposition for 23,000 merks, granted by John Forbes to Sir Robert, bearing to be for the price of the lands ; and contended, that Sir Robert his brother being a man in good credit at the time, an advocate well employed, and possessed of beneficial offices, the cancelled bond subscribed by many famous witnesses, was a sufficient evidence of the onerous cause of the disposition.

Against this it was pled, That the cancelled bond is no manner of proof that any money was paid ; for how does it appear, that the bond was not entirely simulate, signed with this very view, to give evidence of the onerosity of the disposition, and retired two hours thereafter? Nay, how does it appear, that ever it was out of the granter's hand, or ever a delivered evident? There would indeed be a presumption in an ordinary case, from the bonds being cancelled, and in the debtor's own hand ; but this makes no presumption betwixt conjunct and confident persons, more than the narrative of the disposition does : And were this sustained, there would be an end of the act of Parliament ; because every disponent to a conjunct person will take his bond bearing a price, give up the bond the next minute ; and the disposition is thereby supported above objection, equally as if granted to an utter stranger.

In answer to this, Mr Forbes distinguished the case where the fraud is simply and allenary founded upon the conjunction and relation betwixt the parties, the only case the statute 1721 takes notice of, from such where besides the statutory fraud founded on the relation, there appear other fraudulent grounds ; for example, where the disposition quarrelled is *omnium bonorum*, or granted *retentâ possessione* ;  
or



or where it does not appear, that the acquirer had means wherewithal to purchase the same; or perhaps where the granter of the right was at the time a notour bankrupt. In all these and the like cases, the Lords have been in use to ordain the acquirer of the right to prove the onerosity *aliunde* than from the narrative; because of the presumed fraud, arising not from the statute only, but from other pregnant circumstances: And because it for the most part happens, that in reductions upon the act 1621, some such circumstances as these concur, therefore in the course of the decisions, the proof of the onerous cause is ordinarily laid upon the purchaser or acquirer of the right. But on the other hand, where it plainly appears, that the reduction rests solely upon the statute, from the relation betwixt the parties, without any other circumstance; the Lords in that case did never burden the party-receiver of the right to prove the onerosity, providing the deed itself proceeds upon a narrative of onerous causes; and that because the statute itself so provides in these words, "And it shall be sufficient probation of the fraud intended against the creditors, if they shall be able to verify by writ or oath of the party-receiver, that the same was made without any true cause." And taking the matter in this view, practice has never deviated from this clause of the act. Thus then Mr Forbes is founded in the words of the statute, his disposition bears onerous causes, and there is not the least presumption of fraud, except what arises from his relation to the bankrupt. But to put his case still more beyond dispute, he has produced the cancelled bond given for the price, and which was signed before many famous witnesses; as strong an evidence as can be had from the nature of the transaction, since it is but seldom that witnesses are adhibited in the lending or paying of money; which if not sustained, the native consequence must be, to destroy all commerce amongst relations: And were Mr Forbes even so lucky, that he could prove payment of his bond by witnesses, the same question would still recur, *viz.* How does it appear, that the money was not returned next moment? which lands in a progress of proofs *in infinitum*. See a similar case, 4th July 1711, Gray *contra* Chiesly.

"The Lords found the onerosity of the disposition granted by Sir Robert to his brother, sufficiently instructed."

N° CVI.

27th February 1728.

Competition Sir JOHN MERES and ROWLAND AINSWORTH, with the YORK-BUILDINGS COMPANY.

*Arrestment of Rents for Security of a Sum, not payable till four Years after the Arrestment.*

SIR JOHN MERES and Rowland Ainsworth, being creditors to the York-buildings Company in several bonds, not payable till the year 1732, upon their several depending processes before the Court of Session, arrested the whole rents and effects of the Company in Scotland. Against these arrestments the Company offered a petition, craving, that they might be loosed without *caution* or *consignation*, as



irregular and unlawful diligences. And, in the *first* place, it was observed, that bonds are generally taken payable at the next term after their date, or at farthest, the next term after that; and when the term is approaching, though not precisely come, custom has allowed arrestment of rents, payable at or about the same time that the debt itself falls to be due; but there was never an instance that arrestment was allowed of current rents, where the debt, for security of which the arrestment was laid on, was not payable for many years after. It was observed, *2do*, That there is a difference betwixt an arrestment of rents and an arrestment of a principal sum; on this account, that if a principal sum be not arrestable, there the stock on which the creditor lender did rely may be carried off; but as to the profits of any such stock, and particularly as to the rents of lands, which are understood to be daily consumed, it is not possible to imagine the creditor had any view of security therefrom. This being premised, it was represented as inconsistent with common sense, where a debtor pactions, that the money shall not be payable, but at a distant term of years, that nevertheless immediate distress shall be competent by arrestment, the very next day after the bond, against the rising profits of his estate; for why supersede the term of payment, but that in the *interim* the debtor may have the free administration of his estate, that out of it he may raise a fund for his creditor against the term of payment? If it be said, *He may find caution*; this is no remedy, at least a remedy worse than the disease. Many a man will give his bond who will not give a cautioner: Where such a one pactions that the payment be at a distant day upon his own credit, the creditor accepting of his security as sufficient, is it to be allowed, that the creditor shall have it in his power to force him next day to give a cautioner, by arresting his whole effects? Many a one will give a bond payable at a distant day, with this very view, that although at present he cannot answer the bond, or find caution, he will be able at the day of payment; and may foresee a reasonable way, and give satisfaction thereof to the creditor; but if distress may immediately proceed by arrestments, then indeed the scheme is blown up, and the intention of parties quite disappointed. In the *next* place, granting the Company could find caution, the absurdity is not removed; might not this cautioner again arrest for his relief? and so would not this be endless? what was the intention of the stipulation for a distant day of payment?

It was yielded by the creditors, as an unreasonable and malicious thing in any party to use diligence for security of a sum payable at a distant term, if the debtor remains in good credit; but if he begins to dilapidate, or other creditors proceed to diligence, there is all reason for using the legal remedies, to prevent other creditors from running away with the subject of payment. And thus, in the noted case of Easter-Ogle's creditors, the Lords found, 24th January 1724, "That diligence might proceed upon the daughter's bond of provision, though the term of payment was not till her age of eighteen," ten years after the competition: And in the ranking of the creditors, they "sustained the diligence by adjudication, preferable to such creditors who had not adjudged within year and day." Now, in the present case, not only are diligences going on  
against



against the Company's estate in Scotland, but since the arrestments laid on, they have given an universal infestment over the whole to certain annuitants, for above L. 10,000 Sterling *per annum*. Can it then be supposed, though the delay of payment was agreed to in favour of the Company, that it was the intention of parties at contracting, that they, in face of the sun, might alien their means and estates, and the creditors who granted the favour be obliged to stand with their arms across, without power to keep the least hold of the effects, from which only they can hope for payment? It is surely a good answer to the inconveniencies urged by the debtors, that arrestment can be loosed, upon finding sufficient caution; for though a cautioner was not originally granted, the supervening circumstances make it reasonable now to insist upon it. Nor is it new in the law of Scotland, in allowing diligences to go out against a debtor, that regard is had to his present circumstances. An inhibition offered against a man of an opulent fortune, for a small debt, is often stopped as an effect of malice; and if Sir John Meres, or any other of the creditors to the Company, had proceeded to arrestment, when their credit was entire, and no other creditor doing diligence, it is not improbable the judges might have interposed; but as it is believed, the parties themselves will not take upon them to affirm that such is their case, there appears to be neither law nor equity for the demand made in the petition.

"The Lords refused the desire of the petition."

N° CVII.

February 1728.

MARION HENDERSON and HUGH CAMPBELL her Husband, for his Interest, *contra* DAVID HENDERSON.

*A Father, by any Deed to take Effect only after his Death, (though not on Death-bed) cannot disappoint his Childrens Legitim.*

CLAUD HENDERSON, merchant in Glasgow, having a son and three daughters, made a disposition of his whole heritable and moveable estate to his son; wherein "for the love and favour he had to him, he the said Claud Henderson, *in case it should happen him to depart this life before his said son*, gives, grants, and dispones to him, his heirs, executors, &c. all and whatsoever debts, goods, gear, lands, heritages, &c. belonging or competent to him, or what he should thereafter purchase or acquire." Then follows a clause, empowering the said son "to procure himself served heir of line in special and in general to his father, and to obtain himself executor *de-cerned and confirmed to him*; and he thereby nominates his said son, *his sole executor and universal legatar, and intromitter with his goods and gear whatsoever.*" Of the same date he grants bonds of provision to his daughters, which he declares, "should be in full satisfaction of all they could anyway claim by his decease." The other daughters resting satisfied with their provisions, Marion the youngest rejecting her bond, intended a process against her brother, the disponee, to account to her for her legitim; and she contended, that



that by no testamentary deed, or donation *mortis causa*, can a father evacuate his childrens right of legitim.

It was allowed by the defender, That the legitim is so founded in law, that a father cannot arbitrarily exclude his children from it; but then he contended, That the father, as administrator of the goods in communion, with ample and almost absolute powers; as he can arbitrarily change his heritage into moveables, or his moveables into heritage; as he can alienate for onerous or rational causes, or even gratuitously, providing it be not *dolosè* to disappoint the legitim; no reason can be assigned, why under the same restriction, these powers may not be exercised in deeds testamentary or *mortis causa*, if not done *in lecto ægritudinis*, as well as deeds *inter vivos*; and it was expressly determined, 8th December 1675, Thomson *contra* the Creditors of Thin, "That the husband hath an absolute power of disposal of all the moveables, both to take effect in his life, and after his death, *sine dolo*." And Sir James Stewart in his Answers to Dirleton, *voce Bonds of Provision*, holds, that bonds of provision lying by a father at his death, will come off the whole head of the executry, and so impair the legitim. In the present case, there is not the smallest pretence to allege, that the father designed fraudfully to cut his daughters out of their legitim; on the contrary, he dealt with them bountifully; he bound himself in a determinate provision of 12,000 merks to each, much more than was provided to them by their mother's contract of marriage; and if he gave his son more ample provisions, with a view to establish a family, that is a liberty with great reason to be indulged in one, whose stock is the acquisition of his industry. It is certain, had Mr Henderson dreamed of the least difficulty in the method he chose to execute his will, he had many other ways to make it effectual; he would not have failed to give his son an absolute disposition *inter vivos*; or if he inclined it should remain with himself during his life, it was but turning his moveables into heritage, and the matter was done. And truly to take the dispute in this view, it appears unaccountable, that the law should arbitrarily restrain a man from disposing of his effects in a certain shape, which yet it freely allows him to do, by making a small circuit.

Answered for the pursuer, A father can change his moveables into heritage, alienate upon onerous or reasonable considerations, even upon some occasions, gratuitously, or do any other reasonable deed *inter vivos*, because these are all of them acts of *administration*, indeed more exuberant than belong to ordinary *trustees*; but when he goes about to make a testament, name executors, or donators *mortis causa*, there he is acting quite out of his sphere; he drops the character of *administrator*, and assumes that of *absolute proprietor*; and therefore, deeds of that nature can have no effect, except upon the dead's part, of which he has the absolute disposal. 2do, The legitim is a portion of goods, which necessarily accrues to the children *ipso facto*, upon the death of their father; whatever was truly his at his death, the third share falls to them; and from the nature of the thing, no testamentary deed, or *mortis causa* donation can exclude the legitim, because these take no effect till after death. And hence it is thought, that a bond of provision lying by a father at his death, cannot impair the legitim, because it was never a debt upon him, and consequently

not



not upon the legitim; and this is the Viscount of *Stair* his opinion, who says, *l. 1. t. 5. § 6. § 2. in med.* "That bonds of provision delivered in *liege poustie*, do as other debts, affect the whole executry;" plainly intimating, that unless delivered in *liege poustie*, they do not. And the decision mentioned above, Thomson *contra* the Creditors of Thin, is perfectly consistent with this; the case there was of a bond delivered in *liege poustie*, suspended only as to the payment till the death of the granter; and from the decision applied to the case, can be inferred no more, but that if a man make a formal alienation *inter vivos*, which naturally excludes the legitim, he may suspend the effects till after his death, providing it be not *dolosè* to disappoint the legitim.

These grounds of law do both of them conclude strongly against the defender; for his right is not only a donation *mortis causa*, of his whole effects, which surely passes the power of an administrator, however exuberant; but these effects all of them were absolutely the father's when he died, and of necessary consequence subjected to the legitim.

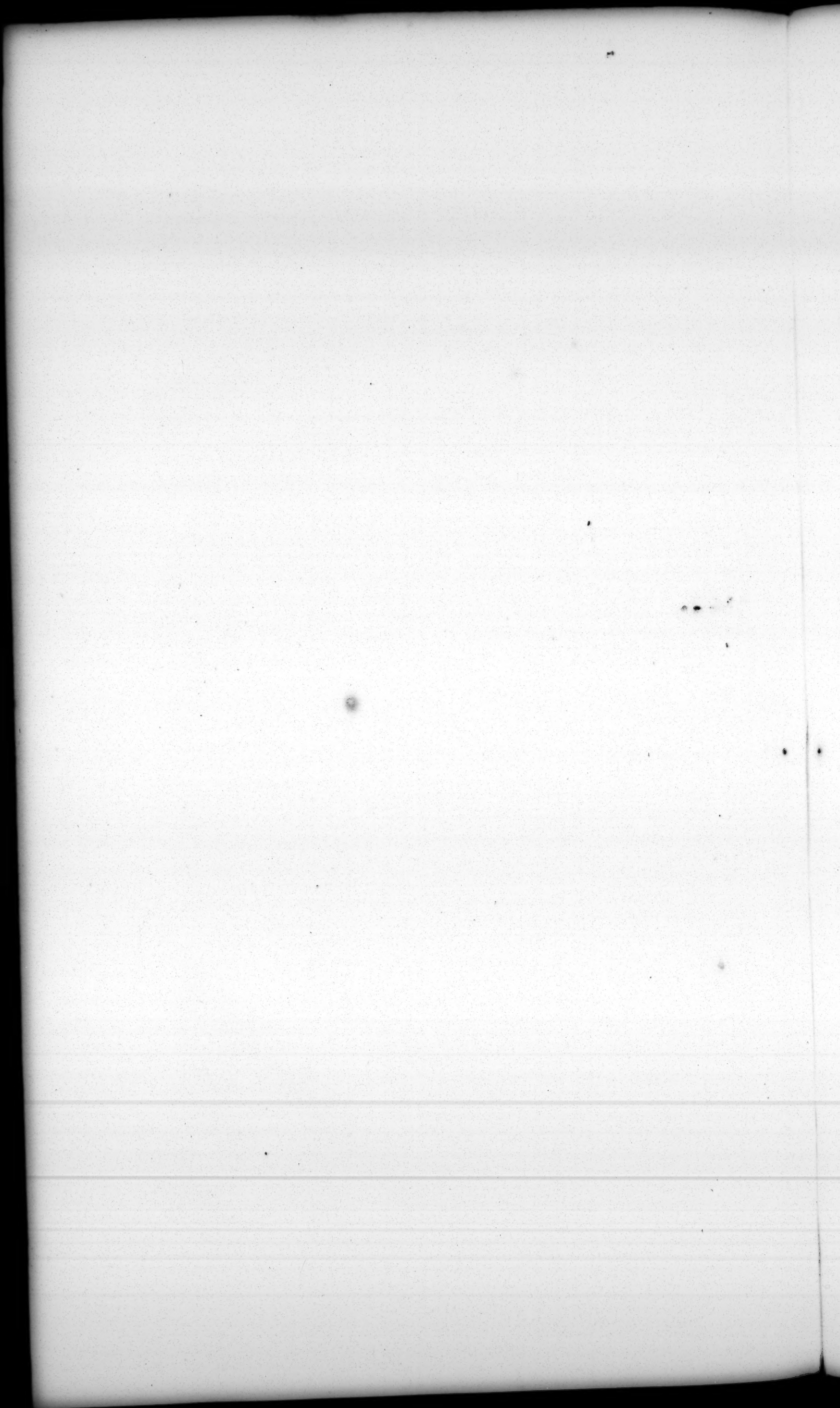
There was another argument pled for the defender, That the legitim sure is no stronger, than a provision of conquest to bairns in a contract of marriage; which the father, it is true, cannot fraudulently disappoint, because of the obligation brought upon him by his deed, similar to the obligation upon him in the case of legitim, arising from the law; but that he may rationally divide such conquest among his children, giving to one more, to another less, according to his pleasure, provided he does not exclude any of them, seems to be the opinion of our lawyers; and so it was lately decided betwixt Anna and Jean Dowies, 9th January 1728, where the Lords found, "That the father Mr James Dowie had a power of making an unequal division of the sums, lands and conquests amongst the heirs and bairns of the marriage; but that he could not totally exclude any of them without a cause, from a share thereof." And in this case it was contended, that the father had gone no further, than to make an unequal division; and was so far from excluding any of his children, that they have all of them got reasonable provisions, suitable to their father's estate, and their station in the world.

The pursuer answered, There is no similitude betwixt the cases; a provision of conquest to the heirs and bairns of a marriage, was never intended further, than that the father may not have it in his power arbitrarily to disappoint the children of the marriage; and it is perfectly consistent with this, that one child have more than another, for this is still keeping within the limits of his obligation. But the legitim is not an *obligation*, it is a right to a share of the father's moveables, which takes place *ipso facto* upon his death, in favours of every one of the children equally; and the law of the legitim considers not the children of one marriage, in opposition to the children of another marriage; or the whole children conjunctly, in opposition to strangers; but each child separately for an equal share.

"The Lords found the pursuer entitled to her legitim."

F I N I S.







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# I N D E X.

N. B. (N) denotes the Decisions: Where it is wanting, the Number denotes the Page.

## A

**A** BREVIA TE] See Adjudication.

*Action*] It signifies not who acts, but in whose name and by whose authority, 169.

*Acceptance*] Necessary by the Roman law, not so with us: A disposition in any person's favours directly establishes the right in him, even in his absence, and without his knowledge. 119, 200.

*Adjudication*] Adjudgers within year and day, brought in *pari passu* after expiry of the legal, as well as before, N. 19. No absolute security in purchasing upon appraisings or adjudications, 41. The abbreviates of adjudications must be recorded, otherwise they have not the benefit of the act 1661, bringing them in *pari passu* with the first effectual, N. 88. An adjudication, though for some time in the state of a right of property, if afterwards through informalities it be reduced to a security, the intromissions had *medio tempore* are imputed in extinction thereof, N. 18.

*Adjudication with a Charge*] Is no *real* right; nor excludes a posterior infestment of annualrent, providing the heritable bond was granted prior to the adjudication, N. 48. Excludes not the wife's terce, N. 56. Is carried by a general service, 108.

*Adjudication for Security*] Was sustained of a debt not payable for many years thereafter; so as to be brought in *pari passu* with other adjudications, 206.

*Administrator*] See Communion of Moveables.

*Aliment*] The father is only bound to aliment his children till their majority, that they can provide for themselves, 60.

*Annualrent, Infestment of*] The bygones, moveable, and go to the executor; otherwise in bygone feu-duties, 30. Granted by one having a disposition to lands without infestment, what effect it has, disputed, N. 81.

*Apparent Heir*] Sometimes liable in *valorem*, though not liable upon any passive title, 15. One passing by an apparent heir, who had been three years in possession, and serving to a remoter predecessor, is not liable to fulfil the apparent heir's *gratuitous* deeds or debts, N. 74. But is liable to fulfil the apparent heir's *rational* deeds in his contract of marriage, N. 44. One passing by an apparent heir three years in possession, and liable thereby to his debts, has relief off the apparent heir's representatives in any other subject, N. 75. An apparent heir possessing by virtue of an adjudication led upon his own bond, though it did infer a passive title, was no extinction of the diligence; and yet the same person was both debtor and creditor in the same sum. The reason of this, 196.

*Arrestment*] General rule for determining the preference in the competition amongst arresters, N. 100. Difference betwixt arrestment of rents and arrestment



ment of a principal sum, 205. Arrestment of rents sustained, though long before the term of payment of the debt upon which the arrestment was founded, because the debtor was *vergens ad inopiam*, N. 106.

**Assignment]** The old style of assignments runs as they were only mandates; but in our present practice an assignment intimate is a complete conveyance, *funditus* denuding the cedent, 38. Assignment without intimation makes no conveyance, 176, 177. Notwithstanding an assignment unintimated, the subject remains *in bonis defuncti*, confirmable by his executors; and an executor-creditor confirming before the assignee's intimation, will be preferred, N. 87. The creditor is bound to assign to the cautioner upon payment. Whence this obligation arises, 76, 187.

**Assignment general]** An assignment by a debtor to as much of the rents of his lands that should be due at his decease, as would answer a certain sum, found to be a general assignment, needing confirmation, N. 38.

**Assignment to Mails and Duties]** The nature of it, 71. Wherein differing from a life-rent-estate, 72. Not good against singular successors in the lands, 161. Is not a real right in the lands; but barely a *personal* action against possessors, *ibid.* Is no *mid-impediment*, to hinder the cedent from disposing upon the land, though the assignment fall of consequence, *ibid.*

**Attainted Persons]** Not under an incapacity to contract, 124.

## B

**BANKRUPT]** Alienations by a bankrupt to one creditor, in defraud of another, are truly null, as *à non habente potestatem*, 136. Alienations not reducible upon act 1621, if the debtor did not thereby become insolvent, N. 9. Reduction upon the head of bankruptcy, not good against onerous singular successors, 118. In the case of bankruptcy, reasons for differencing gratuitous alienations from gratuitous contractions, 18. Disposition by a bankrupt in favours of his whole creditors, not reducible upon act 1696, N. 61. The act 1696 anent bankrupts reaches only securities given for former debts, not *nova debita*, N. 69.

**Base Infeftment]** Effectual without possession except in competition, 145, 146.

**Behaviour as Heir]** Whence inferred, 12, 13. It is not *behaviour*, unless there be intromission, or some deed whereby creditors are prejudged, 12. The founding a defence upon a predecessor's writ, not *as* giving any right to the defender, but *as* an argument of the want of right in the pursuer, is not *behaviour*, 14. Proposing a defence of payment, or such like, will not infer the passive title of *behaviour*, unless adminicled with intromission or otherwise, 13. Behaviour as heir *non transit in hæredes*, but dies with the person behaving, 114, 115.

**Bills]** It is inconsistent with their nature to be gratuitous, 56, 72. A *donatio mortis causa* cannot be constituted by a bill, N. 35. Nothing has the privileges of a bill, but the obligation upon the drawer and acceptor to the possessor; not the obligation arising to the acceptor for repetition against the drawer, 190. Bills *in re mercatoria*, though not for money, are sustained; but not indulged in the extraordinary privileges of money-bills, 56. A bill payable three years after date, found not to enjoy the extraordinary privileges, 107. A bill not in the ordinary form, nor *in re mercatoria*, found null, N. 25. Bills bear annualrent against the acceptor, without being protested for not-payment, N. 15. Bear not interest against the drawer, unless protested for not-acceptance, 30. Sometimes otherwise, *ibid.* Sustained though bearing annualrent from the date, and before the term of payment, N. 99. Bearing a penalty is null, 192. Is indorsable, though not bearing *to order*, N. 78. Is moveable *quoad fiscum et relictam*, N. 55. Not like a bond, to be considered as a *feodum pecunie*, 107. Proves its date against the heir, though a holograph writ does not, N. 57. Payable on a certain day, needs not be presented by the *porteur* before the day for acceptance, N. 93.

It



It is sufficient if a bill is accepted, though it was not addressed to any person, N. 96.

*Blank Writs*] The act 1696 anent blank writs, extended to a disposition of tailzie, blank in the substitution; so as to annul the substitution afterwards filled up, N. 33.

*Bona fides*] The effect thereof in purchases. Defends only from repetition of what is consumed, 39.

*Bond of Provision*] By what means it becomes the child's evident, and irrevocable, N. 6. Though out of the granter's possession, not presumed delivered for the child's behoof, 10. A father cannot grant to his children bonds of provision, though suitable, upon deathbed, N. 27. A bond of provision to a child not imputed into its legitim, N. 67. Nor into former bonds, 131. Bond of provision lying by a father at his death, impairs not the legitim, 208.

*Bond secluding Executors*] Is in its nature and by the law moveable, though it goes to the heir, 103. Is conveyable by testament, 104. But not upon deathbed, N. 53.

*Bond containing Substitutions*] Is in its nature and by the law moveable, 104. Yet is conveyed by service, *ibid.* The creditor may test upon it, *ibid.* But is not confirmable by an executor-creditor, N. 103.

*Bonis defuncti*] The subject remains in *bonis defuncti*, notwithstanding an unintimated assignation, 176, 177.

## C

**C**AUTIONER] One may be a cautioner with respect to his co-obligant, at the same time that he is a principal with respect to the creditor, 58. Obligation of mutual relief has place amongst cautioners, though not bound at the same time, or in the same writ, N. 37. Creditor must assign to the cautioner upon payment. Whence this obligation arises, 76, 187. See *Solidum*.

*Charge*] An adjudication with a charge against the superior, is not a *real* right, N. 48. N. 56. Regulates the competition of adjudications one with another, but gives no preference in competition with voluntary rights, 95, 108. Is carried by a general service, 108.

*Charge general and special*] Executions of general and special charges not necessary to be produced after 20 years, N. 63. General and special charges are not *warrants* but *grounds*, 123, 124.

*Children*] If one bind himself in his contract of marriage, to pay a certain sum *liberis nascituris*, at a certain term, the children will be considered as creditors, and allowed to compete with onerous creditors, N. 45. One in his contract of marriage being obliged to take the conquest to himself, for the *use* and *behoof* of the children in fee; there being only one daughter of the marriage, she was found a creditor by this clause, and that action was competent to her against her father, to fulfil his obligation, N. 82. A sum of money provided to the *heirs* of a marriage, found to divide amongst all the children equally, the sum being small, and the children not otherwise provided, N. 95. Separate provisions not imputed into the legitim, unless so expressed; but both may be drawn, N. 67. 168. Bonds of provision not even imputed in former bonds, 133. A tocher given by a father in his daughter's contract of marriage, imports not a discharge of the conquest provided to her in her father's contract of marriage, N. 83. A tocher in a child's contract of marriage, is interpreted to be in satisfaction of every former *special* provision, but not of any *general undetermined* claim, as a clause of conquest, legitim, &c. 167, 168. Children claim their legitim, not by succession, or any right derived from their father, but *jure proprio*, 198.

*Collation*] In drawing a share of the moveables, an heir-portioner is not bound to collate with her sisters an estate disposed to her by her father, N. 20. A younger brother is in the same case, 42, 43.



- Commonty]** In division of commonities, the proprietor gets a fourth part allocate to him as a *præcipuum*, and draws his share of what remains proportionally with the other persons having servitudes, N. 42.
- Communion of Moveables]** The father as administrator, can do reasonable deeds, as *inter vivos*, with respect to the communion of moveables; but cannot make testamentary deeds, or donations *mortis causa*, except in his own third, 208. The wife accepting a conventional instead of her legal provision, the moveables receive a bipartite division betwixt the legitim and dead's part, N. 66.
- Compensation]** Compensation operates not *ipso jure*; makes only an *extrinsic* exception, 35, 36. Proponable against assignees voluntar and legal; and stops the course of interest. The reason of this, 37. Not proponable after sentence, *ibid.* Not proponable upon a prescribed debt, N. 17.
- Competition]** In competition betwixt the gratuitous and onerous creditors of a bankrupt, reasons for preferring the onerous creditors, without regard to what time the debts were contracted, 18.
- Condictio indebiti]** Competent in the Roman law when one paid who had a ground of compensation: Not so with us, 37. Payment being once made to the cedent; if he become insolvent after payment made a second time erroneously to the assignee, in that case the assignee is not liable in a *condictio indebiti*, N. 39. An heir entering *cum beneficio inventarii* paying to the creditors more than the value of the inventory, has no *condictio indebiti*, 97.
- Condictio ob turpem causam]** 81.
- Confirmation]** What subjects go by confirmation, and what by service, 197, 198.
- Confusion]** Makes not an *absolute* extinction, but only a temporary suspension of obligations, N. 102.
- Conjunct and confident Person]** In a deed betwixt conjunct and confident persons; how far a proof is necessary of the onerous cause, otherwise than from the deed itself, N. 105.
- Conquest]** Divides amongst females, as heirs-portioners, the same way that heritage does, N. 3. One being bound to take the conquest to the children of the marriage, was found to have power to make an unequal division thereof amongst the children of the marriage; but that he could not totally exclude any of them, without a cause, from a share thereof, 209. A tocher given by a father in his daughter's contract of marriage, imports not a discharge of the conquest provided to her in her father's contract of marriage, N. 83.
- Consent]** Land-rights are not transmissible by sole consent: Yet any objection may be renounced by sole consent; competent against a disposition of lands formally constituted, 171.
- Contract of Marriage]** See Children. See Heir of Provision. *Obligements* in contracts of marriage *liberis nascituris*, interpreted always to resolve into a succession, unless where a limited time is fixed for performance, N. 45. N. 51.
- Courtesy]** Differences betwixt the *terse* and *courtesy*, 5. A husband in possession of the courtesy is liable for the current annualrents of *personal* as well as *real* debts: But has relief against the wife's representatives in any other subject, heritable or moveable, which he enjoys not by his courtesy, N. 2.
- Creditor]** Creditors cannot arrest the subject of executry, the reason, 96, 97. The executor not personally liable to them for payment, *ibid.* But he must account to them *secundum vires inventarii*, 60. The creditors have no direct action against the defunct's debtors, *ibid.* When an heir enters *cum beneficio*, the creditors are not brought in *pari passu*, but according to their diligence, as in other cases, N. 49. The creditor's obligation to assign upon payment, whence arising, 76, 187.
- Curator]** Cannot be called to account, as consenter with the minor, to a prejudicial deed, if the minor did not revoke and reduce that deed *intra annos utiles*, N. 98.



## D

**DEAD'S PART]** See Communion of Moveables.

**Deathbed]** The law of deathbed takes place in favours of every sort of heir, male, of line, tailzie, conquest or provision; and whether the infeftments are completed, or if he is heir only by a personal deed, N. 72. Deathbed takes place against every deed done to the heir's prejudice, without regard whether the subject be heritable or moveable, N. 32. N. 53. The action upon deathbed competent to the remotest heir, if lesed, though all the intermediate heirs be provided for, N. 33. Yet the immediate apparent heir's consent to his predecessor's deathbed deed, excludes every after-heir from quarrelling, 68. Bonds of provision to children, though moderate and conform to the father's circumstances, are reducible if upon deathbed, N. 27.

**Debitor non præsumitur donare]** See some exceptions under the word *Children*.

**Declarator of Irritancy]** See Tailzie.

**Decreet]** Decreet of Session cannot be put to execution within the Admiral's jurisdiction, without interposition of the Judge-Admiral, 46. Mutual assistance of courts under the same Legislature, in putting their decreets to execution, is *necessitatis*, not *comitatis*, 46, 47.

**Defender]** May labour under a *personal* incapacity, hindering him to use an exception good in *itself*, 125.

**Delivery]** Is not necessary to establish a right in the person of a disponent; seeing the moment a disposition is duly signed, the right is transferred; but before delivery, the right is revocable: So the precise use of delivery, is to prevent revocation, 200. The death of the granter has the same effect with delivery, *ibid*.

**Destination]** Bonds heritable by destination, not confirmable by an executor-creditor, N. 103.

**Disposition]** Obligation to grant a disposition, equivalent to an actual disposition, 53, 54. The moment a disposition is duly signed, it conveys a right to the disponent, without delivery; but before delivery, there is *locus penitentiae*, a power of revocation, 200. Though annualrents are but *accessory*, and regularly fall with the *principal*; yet a disposition, null as to the principal sum, for want of power in the granter, will carry the annualrents over which he had power, N. 24. One having a disposition to lands, without infeftment, if he give an infeftment of annualrent, what effect it has, disputed, N. 81. If a disposition of lands made by a pupil, and consequently *ipso jure* null, is capable of being homologated, N. 85.

**Donatio mortis causa]** Has no effect against the legitim, 208. Cannot be constituted by a bill: Nor a donation *inter vivos*, 72, 73.

**Durior fors]** See Indefinite Payment.

## E

**ESCHEAT]** Liferent-escheat will stand good to the superior, though the vassal afterwards lose his tailzied fee by incurring an irritancy, N. 34. Is a temporary *real right*, 72. Wherein it differs from an assignation to mails and duties, *ibid*. A gift of escheat taken out in name of a trustee, for the behoof of several persons therein named; with a general clause, "That the further benefit shall be converted and applied to the utility and behoof of the remanent creditors, at the sight of the Lords of the Treasury," was not found to be a trust for the behoof of these remanent creditors, N. 46.

**Eviction]** See Warrandice.

**Exceptions]** The different effects of exceptions, as they are founded in the circumstances of the creditor, and of the *jus crediti*, i. e. of *personal* and *real*, or *extrinsic* and *intrinsic* exceptions, 121, 122. Exception, though good in *itself*,  
it



it may happen that there is a personal objection against the defender from using it, 125.

*Executor*] Is but a *trustee*, and cannot gratuitously discharge debts owing to the defunct, N. 28. Not personally liable to the creditors for payment, 97. Difference betwixt an heir *cum beneficio* and an executor, *ibid.* The defence of being exhausted, is an *extrinsic* exception, 51. The executor is bound to pay legacies, if there is sufficient fund at the time of the pursuit, though there was not when the testator died, N. 22.

*Executor-creditor*] Has no access to confirm a bond containing substitutions, N. 103. Confirming a subject assigned by the defunct, is preferred to the assignee, who did not intimate till after confirmation, N. 87.

*Executry*] Not arrestable by creditors. The reason, 97.

*Extrinsic exception*] See Exceptions.

## F

**F**ACTUM INDIVIDUUM] Two co-obligants bound *conjunctly*, but not *severally*, in a bond of relief, the tenor whereof was, "That they should retire the bond or a sufficient discharge;" if this was a *factum individuum*, to make each liable *in solidum*, argued, 58.

*Faculty to burden*] Contracting personal debt is in no proper sense an exertion of a faculty to burden, 34. Yet it may be made real by adjudication upon the estate, burdened with the faculty, even after the debtor's death who had the faculty, as long as the estate remains with the disponent, who took it with that burden, 32, 33. Not after the estate has gone to onerous purchasers, N. 16. One accepting a disposition with a faculty to burden, reserved to the granter, is upon that *medium* personally liable to the granter's debts, 33. One reserving a faculty to burden, his anterior as well as posterior creditors, have the benefit thereof, *ibid.*

*Feu-duties*] Bygone feu-duties are the proper debt of the heir of the defunct vassal; and if paid by the executor, relief is competent, N. 14. Bygone feu-duties, in use to be confirmed by the commissaries, 28. A charter with a *novodamus* is a good discharge to the vassal, even of the feu-duties that fell due before the superior's own time, 29. Difference betwixt bygone feu-duties, and bygones upon other *debita fundi*, *ibid.*

*Fee*] In an actual settlement of lands or money to a husband and wife in life-rent, and to the children in fee; the husband interpreted to be *fiar*. But in an obligation to take the life-rent to the husband and wife, and the fee to the children, the performance whereof is limited within a certain time, the interpretation is otherwise, 100. In what cases the maxim is applicable, that a fee cannot be *in pendent*, 14.

*Fiar*] He who has a life-rent, with a power to dispend, burden, impignorate, &c. is in the eye of the law really *fiar*, 32.

*Fire*] When fire happens in a house, upon whom the burden of proof lies, 49.

*Foreign Decree*] Makes not a *res judicata* here: If through comity our Judges interpose their authority to a foreign decree, the decree is not put to execution, but the sentence of our Judges upon the decree, 194. In foreign decrees *presumitur pro sententia*; and they will be put to execution here, unless somewhat competent in law or equity be objected, N. 21. Cannot be put to execution, if inconsistent with our laws: Otherwise, though they carry what is not provided for by our laws, 45, 46. Are authorized here only *ex comitate*; and therefore a penal sentence will not be put to execution, 47.

*Foreign Writs*] Contracts made abroad, sustained here, though defective in our solemnities, 44. Testament made in England with relation to heritage in Scotland, is not effectual, 46. A bond granted in England, bearing registration in Scotland, is effectual in Scotland, though not in the Scots form, N. 23. Yet such a bond must be judged by the law of Scotland, in so far

as



as not to be taken away by witnesses, 51. The reason of the difference, 52.  
The rule *locus contractus* comprehends also *quasi* contracts, N. 8.  
*Fraud*] See conjunct and confident Person.  
*Funeraria Actio*] Is not competent, where the pursuer acted upon another's mandate, without intention to serve the defender, N. 84.

G

**G**ENERAL CHARGE] See Charge.  
*Gestio pro Hærede*] See Behaviour.  
Grounds] The nature of them, and how they differ from warrants, 123:

H

**H**ÆREDITAS JACENS] Titles to a *hæreditas jacens* cannot be made up otherwise, than by a *service* to the defunct, N. 73.  
*Heir of Provision*] A sum of money provided to the heirs of a marriage, found to divide amongst all the children equally, the sum being small, and the children not otherwise provided, N. 95. One being bound in his contract of marriage, to infest himself in some lands within a precise day, about a year after the marriage; and being so infest, immediately to resign for new infestment to the heir of the marriage in fee; the heir of the marriage was found to have a good action against his father to denude, N. 51. In a contract of marriage, though the estate be provided to the heir of the marriage, the father has a discretionary power upon rational considerations, to pass by the heir, and give the estate to another son of the marriage, N. 50.  
*Heir cum Beneficio*] Differences betwixt an heir *cum beneficio* and an executor, 97, 98, 127. Is not a *trustee* for the creditors, but a proper debtor, 98, 127. The benefit of inventory does not *ipso jure* diminish the creditors claims; it gives only an *extrinsic* exception, which the heir may use or not at his pleasure, 96, 97. And therefore an heir *cum beneficio*, who extends his payments beyond the inventory, has not a *condictio indebiti*, 96. An heir *cum beneficio* getting eases from some creditors, is obliged to communicate these eases to the rest, N. 65. An heir entering *cum beneficio inventarii*, the creditors are not brought in *pari passu*, but according to their diligence, N. 49.  
*Heirs-portioners*] See Conquest. An estate disposed by a defunct to his eldest daughter, does not exclude her from drawing her share of the moveables jointly with her sisters, N. 20.  
*Heritable*] What subjects are heritable and moveable, is a distinct question from, What subjects go to heirs and executors, 103. Bonds bearing annualrent, how they came to be reckoned heritable, 106. Every sum bearing annualrent was not by the old law heritable, but only where a *feodum pecunie* was established, 106, 107. A bond having a clause of infestment, the debtor dying before the term of payment, found moveable *quoad debitorem*, N. 10. The same, the creditor dying before the term of payment, 107.  
*Heritage*] Any writ, whatever way conceived, except in form of a testament, is valid to convey heritage, in so far at least, as to infer an obligation upon the heir to denude, N. 33.  
*Holograph*] See Writ.  
*Homologation*] If deeds *ipso jure* null, are capable of homologation, N. 85.  
*Horning*] Not taken away by compensation, though the charger be indebted to the person denounced, a sum equal to that in the horning, 37.  
*Hypothec*] Our practice disallows of hypothecs, without delivery of the thing hypothecated; a few cases excepted, 135. The master's hypothec upon his tenants stocking subsists three months after the year's rent falls due, that he may have time to make it effectual for payment of his rent, N. 76. Furnish-



ers for *building* have no hypothec upon the ship, N. 68. Whether furnishers for *repairing* have a hypothec, 133.

## I

**I**MPPLIED OBLIGATIONS] See Disposition. Description of implied obligations, 76. They have place in tailzies, 202.

*Indebiti Condictio*] See *Condictio indebiti*.

*Indefinite Payment*] Rule for the application of indefinite payments, 111, 112.

In indefinite payments *electio est debitoris*, this rule explained, 112. Applied to sums not bearing annualrent, rather than to sums bearing annualrent, N. 5.

A bankrupt cannot apply an indefinite payment to an obligation with cautioners, in defraud of his creditor, to whom he is also due a sum without cautioners, 111. Neither to the obligation without cautioners, in defraud of the cautioners in the other obligation, 113. But the application must be made proportionally to both debts, *ibid*.

*Indorsation*] Is virtually and formally a bill, 190. Every sort of obligation may be conveyed by indorsation, N. 97.

*Infeftment*] The want of registration, by the old law, before act 1693, was not a nullity, but solely a ground of preference in a competition, 148.

*Inhibition*] Will not be allowed to pass against one of an opulent fortune, for a small debt, 207. Inhibition upon a dependence, valid though it mention not the special sum or ground of debt upon which the process was raised, N. 36. But the debtor, upon application to the Lords, will obtain liquidation or restriction of the sum, 74.

*Insolvency*] See Bankrupt.

*Institution*] Provisions designed to one in defect of another, though conceived by way of *substitution*, resolve into a *conditional institution*, where the first institute fails without having the right; and the person called in the second place, draws the provision, not as a *substitute*, but an *institute*, N. 77. 201.

*Interdiction*] A disposition of bygone rents is effectual, made by an interdicted person: Not so, if it be of rents in time to come, 54, 55.

*Intimation*] The assignation first intimated is preferred: The reason of this, 176, 177.

*Intrinsic Exception*] See Exception.

*Intromission*] It is not the *fact* of intromitting, that extinguishes the right in virtue of which the intromission is had; but the creditor's *application* of the subject intromitted with, *in solutum*, 39.

*Inventarii beneficium*] See *Heir cum beneficio*.

*Irritancy*] See Tailzie.

## K

**K**IN, *nearest of*] Take not the defunct's third as *representing* him; but *qua* nearest of kin, and in their own right, 197.

## L

**L**EGACY] If the legatee die before the testator, he transmits nothing to his heirs, 153. *In legatis, tempus motæ litis spectandum, non mortis testatoris*, N. 22.

*Legitim*] See Communion of Moveables. Definition, nature and effects of the legitim, 132, 133, 209. Is not a succession, 167. But is *jus proprium* of the children, 198. Provisions to children, unless so expressed, are not imputed in their legitim; but they can draw both, N. 67. A father cannot disappoint the  
the



the legitim, by any deed, though in *liege poustie*, to take effect only after his death, N. 107. The legitim not impaired by bonds of provision lying by the defunct, 208.

*Liferent Escheat*] See Escheat.

*Lis alibi pendens*] The true ground of this defence, 194, 195. Wherever the exception of *res judicata* is not competent, neither that of *lis alibi pendens*, 195. When a suit is intended before the Session, the defender has not an exception of *lis alibi pendens*, though the same suit was depending before any of the Courts in England, N. 101.

*Litiscontestatio*] Is neither a contract or *quasi* contract, 194.

*Locality*] Whether the heritor upon whose lands the stipend is localled, is *personally* liable to the minister, N. 86. Where bolls are localled, if the lands produce not that species, the minister will have an action against the possessor, *pro interesse*, 175. Where the localled stipend falls short, the remanent free teinds of the parish are liable *subsidiariè* to the minister, *ibid.*

*Locus Contractus*] This rule extended to *quasi* contracts, N. 8.

## M

**M**INOR] Deeds by a minor, without consent of his curators, are so far null as not to need reduction; but are not *intrinsically* null, like deeds granted by pupils, idiots, madmen, &c. This explained, 171. A minor, even with consent of curators, cannot alter the settlements of his estate, N. 71. One insisting against his curators, as consenters to a deed done by him in his minority, which he alleged was to his lesion, was found to have no action against them, because he did not revoke and reduce *intra annos utiles*, N. 98.

*Moveable*] See Heritable.

*Moveables*] See Communion of Moveables. No proper *succession* or *representation* in moveables, 198.

*Mutual Obligements*] If in consequence of a mutual obligation, one disposes with a procuratory and precept, a process is competent to stop infestment, and withdraw the disposition, when the other party becomes insolvent without power to implement the mutual cause, N. 29.

## N

**N**EGOTIORUM GESTORUM ACTIO] Is not competent, where the pursuer acted upon another's mandate, without intention to serve the defender, N. 84.

## O

**O**ATH] Of a debtor in a forthcoming, is good against the pursuer insisting for the same debt as assignee, N. 31. An exception made by a defender in a forthcoming, is probable by the common debtor's oath even against the arrester, N. 62. Not, if the common debtor is bankrupt, *ibid.* The cedent's oath not good against onerous, but good against gratuitous assignees: The reason of this, 121, 122.

*Obligation*] An obligation reduced, as *contra fidem tabularum nuptialium*, at the instance of the granter himself, who was minor, but without curators, because granted privately without the concurrence of his friends, whom he had engaged to assist him in the marriage-treaty, N. 1.



## P

**P**ACTUM CONTRA FIDEM TABULARUM NUPTIALIUM] See Obligement.

**Payment]** It is not the debtor's *offer* that extinguishes the obligation, but the creditor's *acceptance in solutum*, 39, 141.

**Penalties in Bonds, &c.]** Are generally restricted to expence and damage; but this not from the nature of the thing, but *ex nobili officio judicis*, 192.

**Pendenti]** In what case the maxim is applicable, that a fee cannot be *in pendenti*, 14.

**Personal Exception]** See Exceptions.

**Possession]** The *liferenter's possession* is the *fiar's possession*; in what cases this maxim holds, 144, 146.

**Præceptio Hæreditatis]** N. 7. *Transit in hæredes*, N. 59.

**Prescription]** Triennial; the effect thereof, 8, 9. The negative prescription of forty years pled upon, not as an *ipso jure* extinction of the obligation, but only *quoad modum probandi* of the obligatory instrument, 38.

**Provisions to Children]** Are not imputed in their legitim, unless so expressed; but both may be drawn separately, N. 67.

**Pupil]** Whether a disposition of lands made by a pupil, and consequently *ipso jure* null, is capable of homologation, N. 85.

**Purchaser]** No absolute safety to purchasers, without searching the records much further back than forty years, 183, 184.

## Q

**Q**UASI Contracts] The rule *locus contractus* extended to *quasi* contracts, N. 8.

**Quot]** Was only payable out of dead's part, 131.

## R

**R**ANKING AND SALE] The common expence in rankings and sale, affects the whole creditors equally and proportionally, according to the shares they draw of the price, N. 13.

**Rata]** *Pro rata*. See *Solidum*.

**Real Exceptions]** See Exceptions.

**Recognition]** A wife in her contract of marriage disposing ward-lands to her husband and his heirs, *infestment* taken thereon infers recognition, N. 54.

**Register]** For apprisings, 42.

**Registration]** *Infestment* by the old law before act 1693, was a real right without registration; the use of registration was to give preference in a competition, 148.

**Relief]** Obligation of mutual relief has place amongst cautioners, though not bound at the same time, or in the same writ, N. 37. Mutual relief amongst cautioners whence arising, 148.

**Rem versum]** The action *in rem versum* is not competent, where the pursuer acted upon another's mandate, without intention to serve the defender, N. 84.

**Representation]** There is no form known in our law of *representing*, or coming in the place of defuncts, but by *service*, 197. No *representation in moveables*; this maxim explained, 197, 198.

**Requisitoria Literæ]** 46, 47.

**Return, Clause of]** In some cases imports a restriction upon the heirs of tailzie, in other cases not, N. 70.

**Reversion]** A reversion is *real* or *personal*: In the last case it is carried by a simple adjudication, without charge or *infestment*, N. 91. It is *real*, when the wadset-right is *qualified* with the reversion: It is *personal*, when the wadset is *absolute*, with a personal clause of redemption, 180. Reversion registered,  
good



good against the positive prescription, N. 92. And so there is no security for purchasers against reversions, without looking over the records, as far back as the 1617, 182, 183.

*Rogatoria Literæ*] 45.

*Run Goods*] Action is competent for the price of run goods, though bought as such, N. 40. Run goods not a species of *res furtiva*, 82.

## S

**S**ALE] See Ranking and Sale.

*Security*] Arrestment of rents sustained for security of sums not payable for some years thereafter, the debtor being *vergens ad inopiam*, N. 106. Adjudication for security of a sum not payable for many years, sustained to compete with other adjudications, the debtor being bankrupt, 206.

*Service*] Is necessary in all cases, whether the subject be heritable or moveable, when the person serving is to *represent* the defunct, 197. What subjects are carried by service, and what by confirmation, *ibid*.

*Ship*] Furnishers for building, have no hypothec upon the ship, N. 68.

*Solidum*] Two bound as principal debtors, without mention of *conjunctly* and *severally*, the bond importing, that the money went entirely to the use of one; whether each is convenable in *solidum*, the one as principal, the other cautioner, or only *pro rata*, disputed, N. 26. See *Factum individuum*.

*Special Charge*] See Charge.

*Stipend*] Whether the heritor, upon whose lands the stipend is localled, is personally liable to the minister, N. 86.

*Substitute*] The substitutes have a proper interest, that the institute do nothing prejudicial to the tailzie, 201.

*Substitution*] Bond containing substitutions; see Bond. Provisions designed to one in defect of another, though conceived by way of *substitution*, resolve into a *conditional institution*, where the first institute fails without having the right; and the person called in the second place draws the provision not as a *substitute* but an *institute*, N. 77. 201.

*Succession*] No *succession* or *representation* in moveables, 197.

## T

**T**AILZIE] The bare contracting of personal debt makes not an irritancy, but allowing it to be made real upon the tailzied lands, N. 34. Declarator of irritancy is necessary to establish the fee in the next heir of tailzie; but without any declarator, if so provided, a fiar by committing an irritancy falls *ipso facto* from his right, 70. Irritancies in tailzies not penal, 158. Therefore declarators upon these irritancies pass against heirs, and are not purgeable, N. 80. An heir of tailzie, however strictly bound up, can provide his wife to the value of a terce, N. 90. An heir of tailzie having burdened the tailzied lands, contrary to the intention of the tailzier, action was found competent to the substitutes in the tailzie, against the heir's other representatives, to purge the tailzied lands of these debts, N. 104. The substitutes have a proper interest that the institute do nothing prejudicial to the tailzie, 201. Implied obligations have place in tailzies, *ibid*. A prohibition to *alienate*, or to *contract debt*, do each of them imply a prohibition to *alter the order of succession*, *ibid*. Though the vassal lose his estate by committing an irritancy, his liferent-escheat already fallen, will stand good to the superior, N. 34. Tailzie good against the heir without registration, N. 47. But not against creditors, N. 52. The act 1685, anent tailzies, has no retrospect; it regulates all *posterior conveyances*, whether the tailzies were made before or after the act, N. 60. But regulates not the *constitution* of tailzies made *before* the act; and therefore such a tailzie needs not be recorded, N. 89. A general



reference in a feisin, to the irritancies of a tailzie, is not sufficient to interpell creditors, according to act 1685; but these irritancies must be repeated *verbatim*, N. 60. The provisions and irritant clauses must be repeated in every conveyance of the tailzie; even in a general retour, if that is the title of the heir's possession, N. 79. There is no irritancy upon an heir neglecting to register the tailzie; which seems to be an omission in the act 1685, 156.

*Terce*] Differences betwixt a terce and courtesy, 4. Is not excluded by adjudication with a charge, N. 56.

*Testament*] Heritage cannot be conveyed in a testament; though it may in any other sort of writ however conceived, importing at least an obligation upon the heir to denude, N. 33. No testamentary deed has effect against the legitim, 208.

*Thirlage*] A charter *cum molendinis et multuris* in the *tenendas*, and in the *reddendo* a blench-duty *pro omni alio onere*, imports a liberation and discharge of any former affriction, N. 41. A proprietor having established a thirlage of *omnia grana crescentia* in his barony, and of *invecta et illata* into his burgh of barony, it was found that the same corns, though growing in the barony, and brought into the burgh, are not subject to both duties, N. 30.

*Turpis causa*] 81.

## U

**U**NION] What effect it has with respect to the mutual assistance of the different courts in Scotland and England, in putting their decrees to execution, 46, 47.

*Usury*] No paction can be usurious, unless it impose harder conditions than the creditor in law can demand, 22. Probable by any sort of witnesses; and the proof not restricted to instrumentary witnesses, N. 43. It is lawful at the time of lending the money, and making the bond, to add to the principal, whatever annualrents shall fall due betwixt the date of the bond and the term of payment, making one accumulate sum, bearing interest from the term of payment, N. 11.

## V

**V**ALENS AGERE] What is understood by this maxim, 145. *Non valens agere*, a good objection against the negative prescription only; not against the positive prescription, 144, 145.

*Vicious Intromission*] The reason why it passes not against heirs, 158, 159.

## W

**W**ADSET] The characteristic of proper and improper wadsets, N. 12. The hazard of the fruits is essential to a proper wadset, 25. Distinction made betwixt wadsets where the conveyance is *qualified*; and where it is *absolute*, with a *personal* clause of redemption: In this case the wadsetter is absolute proprietor; in that, the reverser remains in the radical right of property, 180. Where the conveyance is qualified, the wadset-right falls *ipso facto*, upon payment or consignation of the wadset-sum, and the reverser's right revives, 180. But *absolute* wadsets, with a *personal* clause of redemption, fall not by payment, but must be conveyed, 180, 181.

*Warrandice*] In evictions of whatever subjects, rights in security, lands, &c. the recourse upon the warrandice is not restricted to the price paid for the conveyance, but reaches to the real worth of the subject evicted, N. 4. Infestment of warrandice not excluded by the positive prescription, 182, 183.

*Warrants*]



*Warrants*] The nature of them, and how differing from *grounds*, 123.

*Wife*] Claims her share of moveables, not by any right derived from her husband, but *jure proprio*, 197. Donations of money and other moveables, by a husband to his wife, not imputed in her legal third, 132, 133. A wife consenting to infeftments of annualrent upon her jointure-lands, and the annualrenters thereby being satisfied and paid, they must assign her to any other subject in which they were infeft, in order to relieve her of what she suffered, by yielding them the preference, N. 94. In what cases the wife has a preference upon her own tocher, against her husband's creditors, for security of the provisions stipulated in her contract of marriage, N. 29. 61.

*Witnesses*] Writ cannot be *directly* taken away by witnesses, but may *indirectly*, 85.

*Writ*] Whatever is the true and lawful *cause* of granting, may safely be expressed in the writ. This applies to bills, 72, 73. And whatever follows from the nature of a writ, may safely be expressed in the writ. This also applied to bills, 192. The moment a writ is duly signed, it conveys a right without delivery or acceptance; being in its nature a completed deed, 200. But before delivery, there is *locus penitentiae*, a power of revocation, *ibid.* Writ cannot be *directly* taken away by witnesses, but may *indirectly*, 85. Writ is necessary to the conveyance of lands: But any objection may be renounced by sole consent, competent against a disposition of lands formally constituted, 172. Holograph writs prove not their date, 109.

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